TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 1061

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JOHN RAMSEY AND WILLIAM K. HALE

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED MARCH 22, 1926

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[Citation in usual form showing service on Freeburg & Howard and J. N. Springer; filed March 2, 1926, omitted in printing.]

In United States District Court

Writ of error and return filed March 2, 1926, Western District of Oklahoma

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Oklahoma, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the special January term, 1926, thereof, between the United States of America, plaintiff, versus John Ramsey and Wm. K. Hale, defendants, Case No. 5728, criminal, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of United States, Washington, District of Columbia, together with this writ, so that you have the said record and proceedings aforesaid at Washington, District of Columbia, and filed in the office of the clerk of the United States Supreme Court, Washington, D. C., on or before the 31st day of March, 1926, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 2nd day of March, in the year of our Lord one thousand nine hundred twenty-six.

Issued at office in Oklahoma City, Oklahoma, with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

[SEAL.] HARRY L. FINLEY,
Clerk of the District Court of the United States,
Western District of Oklahoma.

Allowed by
JOHN H. COTTERAL, *Judge.*

United States of America,
Western District of Oklahoma, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified

transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the Western District of Oklahoma.

[SEAL.] HARRY L. FINLEY,
Clerk of the District Court of the United States,
Western District of Oklahoma.

[File indorsement omitted.]

3 In United States District Court

Cause No. 5728

Bill of indictment

Filed Feb. 13, 1926

WESTERN DISTRICT OF OKLAHOMA, *ss:*

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Western District of Oklahoma at the January term of said court in the year 1926, held at Guthrie, and inquiring for said district, upon their oath present, that John Ramsey, a white person, late of said district, on February 6, 1923, in Osage County, in said district, in the Indian country and in and upon the reservation theretofore and then established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land therein which was then and there under the executive jurisdiction of the United States and comprised a restricted surplus allotment, theretofore made under and according to the act of Congress approved June 28, 1906, and entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," of a full-blood Osage Indian, to wit, of one Rose Little Star, whose Indian name then was Tom-pah-pe, and who then was a legal member of said Osage Tribe of Indians, enrolled, under the number 197, upon the roll of said tribe authorized in and by said act of Congress, the title to which said allotment then, to wit, on said February 6, 1923, was held in trust by the United States and was inalienable by said Rose Little Star and which said allotment remained unsold, unalienated, and undisposed of by said Rose Little Star, and, by reason of the fact, which the grand jurors aforesaid, upon their oath aforesaid, charge to be a fact, that said Rose Little Star never
4 has had issued to her by the Secretary of the Interior of the United States a certificate of competency authorizing her to sell any of the lands deeded to her by reason of said act of Congress, and by reason of the fact, which the grand jurors aforesaid, upon their oath aforesaid, charge to be a fact, that no sale of said allot-

ment has ever been permitted, made, or consented to by said Secretary of the Interior, and also by reason of the trust relationship and wardship which then existed between the United States and the members of said tribe, including said Rose Little Star, the alienability and extinguishment of the title of said Rose Little Star to which said allotment then still was a matter under the exclusive control of the United States and said Secretary of the Interior—that is to say, on and in the tract of land known and described as the east half of the southwest quarter of section thirty-four, in township twenty-five north, and range five east, reference being had to the Indian meridian and its base line, it being allotment numbered 188 on said roll, and at a point on and in said tract of land situated about four miles in a northwesterly direction from Fairfax, in said State, county, and district, unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, with malice aforethought, then and there on the part of him, the said John Ramsey, with force and arms, an assault did make upon one Henry Roan, who then and there was a full-blood Osage Indian and a legal member of said Osage Tribe, enrolled upon said roll under number 762, and a certain deadly weapon, to wit, a pistol, which then and there was loaded with gunpowder and leaden bullets and by him, the said John Ramsey held in his hands, then and there unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, and with malice aforethought on the part of him, the said John Ramsey, did shoot off and discharge to, against, and upon said Henry Roan, and that said John Ramsey, with one of the leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, and with malice aforethought, then and there on the part of said John Ramsey, did strike, penetrate, and wound him, the said Henry Roan, in and upon the left side of the head of him, the said Henry Roan, giving to him, the said Henry Roan, then and there, with said leaden bullet, so as aforesaid discharged and shot out of the pistol aforesaid by him, the said John Ramsey, in and upon the left side of the head of him, the said Henry Roan, one mortal wound, of which said mortal wound the said Henry Roan then and there instantly died; and that William K. Hale, a white person, late of said district, then and there unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, and with malice aforethought on his part, did aid, abet, counsel, command, and procure the said John Ramsey in so doing and so to do.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said John Ramsey and said William K. Hale, at the time and place, in manner and form, and by the means, aforesaid, unlawfully and feloniously, by a kind of willful, deliberate, malicious, and premeditated killing, and with malice aforethought, the said Henry

Roan willfully did kill and murder, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

ROY ST. LEWIS,
United States Attorney.

OSCAR R. LUHRING,
Assistant Attorney General.
EDWIN BROWN,
OLIVER E. PAGAN, and
PAUL B. BAILEY,
Special Assistants to the Attorney General.
[File indorsement omitted.]

6 In United States District Court

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN RAMSEY, DEFENDANT.	No. 5728

Demurrer of defendant John Ramsey

Filed Feb. 15, 1926

Comes now the defendant, John Ramsey, defendant in the above-entitled cause, and demurs to the indictment returned against him in the above numbered and entitled cause, and for his separate demurrer to said indictment, says:

1. That said indictment shows upon its face that this court has no jurisdiction of the subject matter of said indictment or of the person of this defendant.

2. That said indictment does not charge nor plead any facts which, if proven, would give the court jurisdiction either of the subject matter of the said indictment or of the person of the defendant, or of the offense sought to be alleged in said indictment.

3. The said indictment does not plead nor allege any facts which constitute an offense against the laws of the United States.

4. That said indictment shows upon its face that if any offense is charged in said indictment against this defendant that the same constitutes an offense against the laws of the State of Oklahoma, and that under the laws of the United States and under the Constitution of the United States this court has no jurisdiction thereof.

Of this the said defendant prays the judgment of the court.

J. M. SPRINGER,
Attorney for Defendant.

[File indorsement omitted.]

7 In United States District Court

No. 5728

[Title omitted.]

Demurrer of defendant William K. Hale

Filed Feb. 15, 1926

Comes now the defendant, William K. Hale defendant in the above-entitled cause, and demurs to the indictment returned against him in the above numbered and entitled cause, and for his separate demurrer to said indictment, says:

1. That said indictment shows upon its face that this court has no jurisdiction of the subject matter of said indictment or of the person of this defendant.

2. That said indictment does not charge nor plead any facts which, if proven, would give this court jurisdiction either of the subject matter of the said indictment or of the person of the defendant, or of the offense sought to be alleged in said indictment.

3. The said indictment does not plead nor allege any facts which constitute an offense against the laws of the United States.

4. That said indictment shows upon its face that if any offense is charged in said indictment against this defendant that the same constitutes an offense against the laws of the State of Oklahoma, and that under the laws of the United States, and under the Constitution of the United States this court has no jurisdiction thereof.

Of this the said defendant prays the judgment of the court.

GRIMSTEAD, SCOTT, HAMILTON & GROSS,
FREELING & HOWARD,
Attorneys for Defendant.

[File indorsement omitted.]

8 In United States District Court

No. 5728

[Title omitted.]

Order sustaining demurrers

Filed March 1, 1926

On this, the 1st day of March, 1926, the separate demurrers of John Ramsey and William K. Hale to the indictment herein came on for final hearing, and the court being fully advised it is

Ordered, that said demurrers be and are sustained upon the ground that section 2145 of the Revised Statutes is inapplicable to the surplus allotment of Rose Little Star, a full-blood Osage Indian allotted under an act of Congress of June 28, 1906 (34 Statutes at Large 539), and that such land is not Indian country, so as to give the Federal Government control over such a crime as alleged in the indictment.

It is thereupon ordered and adjudged that said defendants be and they are discharged herein and go hence without day.

To which order and judgment, and each of them, the plaintiff accepts; and said exceptions are duly allowed.

JOHN H. COTTERAL, *District Judge.*

[File indorsement omitted.]

In United States District Court

No. 5728

[Title omitted.]

Opinion

Filed March 1, 1926

By the COURT:

Since the demurrers were sustained to the original indictment, the defendants have been again indicted, and the facts have been fully alleged, and as far as may be, to show that the place of the offense was at the time Indian country. From the averments it appears to be surplus land allotted to Rose Little Star, an enrolled Osage Indian, and held in trust by the United States, no certificate of competency having been issued to her by the Secretary of the Interior and no sale authorized by him. Demurrers being again interposed, counsel have been indulged to present elaborate arguments and briefs upon the question of whether the allotment was Indian country, where the United States has jurisdiction over the offense.

By the opinion of this court, sustaining the former demurrers, it was held essential to jurisdiction, that the allotment was Indian country—that is, that the allotment was held in trust by the United States. That ruling is deemed to be sound and is adhered to upon the authority of Pelican v. United States, 232 U. S. 442. There the reservation was Indian country and the allotments were held to be the same, as they were reserved from the lands opened to settlement and entry and held in trust, subject to governmental control, and inalienable by the allottees. They were accordingly found to be but diminished portions of the reservation, retaining their Indian character and deriving their source from the reservation itself. The allotments were not held to be so, merely because they were inalienable, by virtue of a temporary limitation on the power of sale, for such a title is not essentially of an Indian character (Libby v. Clark, 118 U. S. 250), and the contention that it is, while ably asserted, appears to be inconsistent with the Pelican case, and it is not sustained by authority.

The same test must be applied to the Osage allotments, that is, whether the trust title by which the Osage Reservation was held by the United States (Brewer-Elliott Oil Co. vs. U. S., 260 U. S. 77 continued into the allotments.

The views of this court as to their character, heretofore entertained in advance of the corrected indictment and the further ar-

guments of counsel, must yield, if the Supreme Court has determined that the Osage allotments were not held in trust by the United States; and two of the cases which have been cited appear clearly to hold that they were not, although the question of jurisdiction was not directly involved.

The first of these cases is United States vs. Bowlby, 256 U. S. 484, where it was said, in terms, that "the allotments to the Osages and to members of the five civilized tribes were not trust but restricted allotments."

The other case is McCurdy vs. United States, 264 U. S. 484. The question was whether a surplus Osage allotment was taxable for the year 1909. Lands were taxable in the State on March 1, but the allotment deeds were executed and approved by the Secretary of the Interior later in that year. In denying the validity of the tax, the opinion necessarily sanctions the issuance of the deeds and holds that by them there was a termination of the trust character of the Osage title. It was held: "Title was in the United States on the date as of which the assessment was made, and did not pass until the execution and delivery of the deeds. The lands were not taxable while held in trust by the United States."

These cases do not leave the controversy over the title of Rose Little Star to her allotment open to original opinion by this court, but are found to exclude it. They are determinative that the allotment of Rose Little Star, for which, concededly, a deed had been issued, was not held in trust by the United States, and for this reason, although inalienable, it was not Indian country at the date of the alleged offense, wherefore, the jurisdiction of the United States was not there in force at the date of the alleged offense, but the jurisdiction had been succeeded to by the State court.

The demurrers must be and they are sustained and the indictment is set aside.

Oklahoma City, Oklahoma, March 1, 1926.

JOHN H. COTTERAL, *District Judge.*

[File indorsement omitted.]

In United States District Court

UNITED STATES OF AMERICA, PLAINTIFF vs. JOHN RAMSEY AND WILLIAM K. HALE, DEFENDANTS	No. 5660. Criminal.

Opinion

Filed Jan. 25, 1926

The indictment charges the defendant John Ramsey with the murder of John Roan, on January 31, 1923, in Osage County, Oklahoma, and the defendant William K. Hale with then and there aiding, abetting, counseling, commanding, and procuring John

Ramsey in so doing. The place of the offense is further described as the "Indian country," upon a tract of eighty acres comprising a restricted allotment of Rose Little Star (or Tom-pah-pe), a full-blood Osage Indian, a legal member of the Osage Indian Tribe, enrolled upon the roll of said tribe, as declared by the Osage Indian allotment act of June 28, 1906, remaining unsold and undisposed of by said allottee, and at a point on said allotment described by section, township, and range about four miles in a northwesterly direction from Fairfax, in said county. The victim of the alleged crime is described as a full-blooded Osage Indian, and a legal member of the Osage tribe upon the rolls thereof.

There is no claim that the essentials of the crime are not set forth as defined in section 373 of the Penal Code and in section 332 thereof which declares to be a principal one who aids or abets in the commission of an offense. The main objections are that no crime is charged against the United States, because the Federal laws against unlawful homicide were not extended to the place of this alleged crime or to the protection of Henry Roan.

Section 373 of the code defines and fixes a penalty for murder and manslaughter when committed on lands under the ex-
13 clusive jurisdiction of the United States. By section 2145, U. S. Rev. Statutes, it is provided, ". . . the general laws of the United States as to the punishment of crimes within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.

Controversy is now foreclosed as to the constitutional power of Congress to apply the criminal laws of the United States to a reservation in a State legally set apart for the use of an Indian tribe or to allotments carved out of it. Donnelly v. United States, 228 U. S. 243-269; U. S. vs. Pelican, 232 U. S. 442; United States v. Sutton, 215 U. S. 291. The like power rests in Congress to apply those laws to ceded lands not owned by Indians when located in such proximity that those laws are reasonably essential to their protection. Dick vs. United States, 208 U. S. 340; Perrin v. U. S., 232 U. S. 478. It is immaterial that the Indians may own their lands in fee. U. S. v. Sandoval, 231 U. S. 28. It has been directly held to be a competent exercise of that power to level a punishment against persons having the possession of intoxicating liquors in Osage County, Oklahoma, by reason of the presence of the Indians there, regardless of the title to the lands where the liquors are possessed. Browning vs. U. S., 6 Fed. (2) 801. By the same principle, Congress may apply the more important law against murder for the security of the Osage Indians. U. S. v. Pelican, supra.

There is no difficulty, therefore, in holding that Henry Roan was an Indian to whom Congress was authorized to grant such protection, or that it has done so, if the alleged crime was committed in the Indian country. He was, as alleged, an enrolled full-blood member of the Osage Tribe, and, as appears from the Osage allotment act of June 28, 1906 (34 Stat. 539), subsequent acts of Con-

gress, and the departmental regulations thereunder, the tribal organization continued, subject to departmental powers. There is an Indian agency over these Indians with a superintendent in charge; their funds, including royalties from mineral leases for 25 years and other sources, are subject to distribution by the Secretary
14 of the Interior; leases of the lands are dependent on his approval; the sale of the allotments is subject to his control, etc. And these Indians have continued to be wards of the Government, notwithstanding their citizenship and subjection to various State laws. Mosier v. U. S., 198 Fed. 54; Hallowell v. U. S., 221 U. S. 317; Tiger v. Western Investment Co., 221 U. S. 286; Browning v. United States, supra; United States v. Celestine, 215 U. S. 278; U. S. v. Pelican, supra; Perrin v. U. S. supra; United States v. Nice, 241 U. S. 591; United States v. Gray, 201 Fed. 291. And the power to protect them, being derived from the Federal Constitution, is not dependent upon a compact with the States or a reservation in the act of admission. United States v. Sandoval, supra; Coyle v. Oklahoma, 221 U. S. 559, 574; Joplin Mercantile Co. v. United States, 213 Fed. 926.

But does the indictment sufficiently charge that the allotment of Rose Little Star was "Indian country"? The terms "Indian country" and "restricted allotment" are but conclusions derived from unalleged facts. In what way and against what was it restricted? In what way was it Indian country? What the grand jury conceived to be Indian country may not be so at all. The only facts averred with descriptive certainty are, in substance, that the allotment was that of a legally enrolled full-blood member of the tribe, not sold or disposed of by the allottee. More definite facts are essential to describe the allotment as Indian country. The laws applicable thereto must be consulted to ascertain them.

The allotment act (supra) authorized the Osage tribal roll and the division of the reservation lands among the Indians, consisting of a homestead and other selections and awards, known as surplus lands. The homestead was to be inalienable until otherwise provided by Congress. Secs. 1, 2, 3. The Secretary of the Interior was empowered, upon request and petition of an adult member, to issue to him a certificate of competency, authorizing him to sell, convey, and control his surplus land, the same as any other citizen, and it would be subject to taxation, etc. Sec. 2, subd. 7. By the act of March 3, 1909 (35 Stat. 778), the Secretary was authorized,
15 upon application, to sell any or all of the surplus lands. By the act of April 18, 1912 (27 Stat. 86), the property of deceased and of minor, insane, or other incompetent allottees was made subject to the jurisdiction of the county courts, but no lands were to be sold without the approval of the Secretary. By the act of May 25, 1918 (40 Stat. 579), the Secretary was authorized to permit the sale of the surplus and homestead allotments. From this brief reference to the legislation on the subject, it is apparent that all the

allotted lands might have been freed of governmental trust and become subject to alienation and sale by the allottees.

But the indictment is so far indefinite as to the actual status of the Rose Little Star allotment—that is, whether it was so held in trust, or alienable and free of it, by virtue of a certificate of competency, or authorization of the Secretary of the Interior, or otherwise.

In the first place, the Osage Reservation was acquired from the Cherokees and was conveyed in trust for the tribe. United States v. Brewer-Elliott Oil and Gas Co., 249 Fed. 609; affirmed 270 Fed. 100, 260 U. S. 277. And it became Indian country. Brown v. United States, 146 Fed. 975. The allotments, notwithstanding the divisional deeds to the Osages, were held in trust by the United States, for it is expressly so declared by section 5 of the allotment act. And upon the authority of Pelican v. United States they constituted and remained Indian country, as long as they were not released therefrom.

That these allotments might cease to be of that character while still owned by the allottees seems clear from the decisions. In the Pelican case, the indictment specified that the allotment where the offense occurred was held in trust by the United States. This conclusion was reached by considering that as the reservation formed a part of the Indian country, the allotments still retained "during the trust period a distinctly Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation." It was further held:

16 "The explicit provision in the act of 1897 as to allotments we do not regard as pointing a distinction but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severality where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the Government. In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such under the superintendence of the Government. Donnelly v. United States, supra. The same considerations, in substance, apply to the allotted lands, which when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control."

From the stress thus laid upon the status of the title, where an allotment is the locus of the offense, a conclusion is necessary that Federal jurisdiction not being reserved does not extend to lands held in fee by allottees, free of governmental trust and restriction upon sale. Such title is no longer of an Indian character, and the

State laws then apply to it. The allotment of Rose Little Star would remain Indian country and therefore subject to Federal jurisdiction only if held in trust by the United States, and inalienable for want of authorization or sale by the Secretary of the Interior.

If, as counsel claim, this was a surplus allotment held in trust by the United States and thus inalienable, not being then distributed into "a separate holding" and the Government not "retaining control of it," Federal jurisdiction over the alleged crime existed. And appropriate averments should have been added that this was a surplus allotment made pursuant to the allotment act of June 28, 1906, the title thereto being then and there held in trust by the United States and inalienable by the allottee, no certificate of competency having been issued to her by the Secretary of the Interior, and no sale of said allotment having been permitted or made by the Secretary of the Interior. But there are no such averments, and as without them the allotment may have been free of the trust and subject to sale by the allottee, the indictment fails as to jurisdictional facts, showing that it was committed in the Indian country,
17 which is an essential of the offense. Louie v. United States, 254 U. S. 548. That this was meant to be alleged in due form may be assumed, but it does not sufficiently appear from the language employed in the indictment.

The test of Indian country to be applied here is not found to be whether the allottee had parted with his title independently owned by him. The cases which turn upon the title test refer to the original Indian title of tribes falling within the definition of Indian country by the act of June 30, 1834, or apply that test to lands where the tribal title has been ceded in Indian reservations. Bates v. Clark, 95 U. S. 204; Ex parte Crow Dog, 109 U. S. 556; Dick v. United States, 208 U. S. 340; Browning v. United States, 6 Fed. (2) 801; Evans v. Victor, 204 Fed. 361; Clairmont v. United States, 225 U. S. 551. An allotment owned in fee by an individual Indian free of trust and restriction is not Indian country because his title has not been extinguished.

There was a suggestion, rather than argument, as being material in opposition to the demurrers, that all of Osage County remains Indian country because by the Osage allotment act minerals underlying the lands which composed the reservation were reserved to the tribe for twenty-five years, and the Indian title thereto has not been extinguished. This view, most seriously affecting, as it must, the jurisdiction constantly exercised by the State courts, is inadmissible. It could not apply to this allotment, nor to others not appearing to contain minerals, but even if they be found or assumed to exist such a variable basis of Federal jurisdiction can not be sustained as having been contemplated by Congress. For, by freeing the land of trust and restrictions, the same measure of title passed to the allottees as to lands allotted in other reservations, where the jurisdiction of the State courts has been held to attach, as in Clairmont

vs. United States, supra. Therefore, the better and the sound rule, and the only certain and dependable standard which prevails generally, is that when the Indian holds an alienable title in fee to the surface, Federal jurisdiction, not being expressly reserved by Congress in such cases, has ceased to exist and the State courts have succeeded to the jurisdiction.

18 Whether the views of this court as to the sufficiency of the indictment are well taken, certainly a corrected indictment should be sought, if justified by the facts. The present order will be that the separate demurrers of the defendants are sustained, the indictment is set aside, for want of a sufficient averment of jurisdictional facts inhering in the offense charged as heretofore pointed out, and the cause submitted to the grand jury for its further action. Meantime, the defendants will be held by the marshal to await such action. Of course, if counsel for the Government so elect, a writ of error may be sued out from the Supreme Court, conformably to the criminal appeals act of March 2, 1907, 34 Stat. 1246.

Oklahoma City, Oklahoma, January 25, 1926.

JOHN H. COTTERAL, *District Judge.*

[File indorsement omitted.]

19 In United States District Court

No. 5728

[Title omitted.]

Petition for writ of error

Filed March 2, 1926

Now comes the United States of America, by its attorney, Roy St. Lewis, United States attorney for the Western District of Oklahoma, and complains that in the record and proceedings had in this cause, and in the judgment sustaining the defendants demurrer to the indictment found herein against said John Ramsey and William K. Hale on February 13, 1926, and dismissing said indictment, manifest error hath happened as will appear in the assignment of errors herewith submitted.

Wherefore the United States of America prays for the allowance of the writ of error and for such other errors and processes as may cause the same to be corrected by the Supreme Court of the United States.

This 2nd day of March, 1926.

ROY ST. LEWIS,
United States Attorney for the
Western District of Oklahoma.

[File indorsement omitted.]

20 In United States District Court

No. 5728

[Title omitted.]

Assignments of error

Filed March 2, 1926

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred in the decision of the court herein sustaining the demurrer to the indictment found herein on February 13, 1926, against John Ramsey and William K. Hale:

One

The court erred in sustaining the separate demurrer to the indictment as filed by John Ramsey.

Two

The court erred in sustaining the separate demurrer to the indictment as filed by William K. Hale.

Three

The court erred in not overruling the separate demurrer to the indictment of John Ramsey.

Four

The court erred in not overruling the separate demurrer to the indictment of William K. Hale.

Five

The court erred in holding as a matter of law that the indictment was insufficient in law.

21 Six

The court erred in its construction of section 2145 of the Revised Statutes of the United States.

Seven

The court erred in its interpretation of said section 2145 of the Revised Statutes of the United States.

Eight

The court erred in its decision in deciding that section 2145 of the Revised Statutes is inapplicable to the lands as mentioned and set out in the indictment.

Nine

The court erred in its decision in holding and deciding that the indictment was insufficient in law to give the Federal court jurisdiction over the crime as set out in the indictment.

Ten

The court erred in its decision in holding and deciding that the allotment described in the indictment is not Indian country.

Eleven

The court erred in its decision in holding and deciding that the indictment did not charge facts sufficient to constitute an offense against the laws of the United States.

The United States, aforesaid plaintiff in error, prays that the judgment entered herein sustaining the demurrer to the indictment for the errors aforesaid, and other errors in the record and proceedings herein, may be reversed and altogether held for nothing, and that the plaintiff in error may be restored to all things that it has lost by reason of said judgment, and that the District
22 Court of the United States for the Western District of Oklahoma be directed to vacate and set aside said judgment and compel the defendants in error to plead to said indictment.

This 2nd day of March, 1926.

ROY ST. LEWIS,
United States Attorney for the Western District of Oklahoma.

[File indorsement omitted.]

23 In United States District Court

No. 5728

[Title omitted.]

Order allowing writ of error

Filed March 2, 1926

This 2nd day of March, 1926, came the United States of America, plaintiff in the above-entitled cause, by Roy St. Lewis, United States Attorney for the Western District of Oklahoma, and filed herein

and presented to the court its petition praying for the allowance of a writ of error in said cause to be urged by it, and that the transcript of the record and proceedings and papers upon which the judgment in said cause was rendered may be sent to the Supreme Court of the United States of America, and having accompanied said petition with assignment of errors, as required by law, upon consideration whereof the court does allow the writ of error.

JOHN H. COTTERAL, *Judge.*

[File indorsement omitted.]

24 In United States District Court

No. 5728

[Title omitted.]

Præcipe for transcript of record

Filed March 6, 1926

To the Clerk of said Court:

Please prepare a transcript of record in the above-entitled cause and transmit the same to the clerk, Supreme Court of the United States, Washington, D. C., and include in said transcript the following matters, to wit:

1. Indictment.
2. Separate demurrer of John Ramsey.
3. Separate demurrer of William K. Hale.
4. Order, March 1, 1926, ruling on demurrers.
5. Opinion of the court on demurrers in case No. 5728.
6. Opinion of the court on demurrers in case No. 5660.
7. Petition for writ of error.
8. Assignment of errors.
9. Order, March 2, 1926, allowing writ of error.
10. Citation.
11. Writ of error.
12. This præcipe.
13. Clerk's certificate of transcript.

The plaintiff herein elects to have the printing of said record done under the supervision of the clerk of the Supreme Court of the United States, and under the rules of said court.

ROY ST. LEWIS,
United States Attorney and Attorney for Plaintiff.

Service of the above and foregoing præcipe for record and designation as to printing acknowledged this 6 day of March, 1926.

FREELING AND HOWARD,
By S. P. FREELING,
Attorneys for Defendants.

[File indorsement omitted.]

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In Supreme Court of the United States

Statement of points to be relied upon and designation by plaintiff in error to print the entire record

Filed March 23, 1926

The United States of America will rely on the following points in brief and in oral argument on the hearing of the writ of error, viz:

1. That the term Indian country as used in section 2145, Revised Statutes, extends to and includes surplus allotments to incompetent full-blood Osage Indians, of Osage County, Oklahoma, made pursuant to the provisions of the Osage allotment act, approved June 28, 1906. (34 Stat. L. 539.)

2. That the District Court for the Western District of Oklahoma has jurisdiction of the crime of murder committed by a white person against a full-blood Osage Indian in Osage County, Oklahoma, on or about the 6th day of February, 1923, on the surplus allotment of a full-blood Osage Indian located in said county and State.

3. That the territory, which constituted the Osage Indian Reservation in the State of Oklahoma, has not lost its character as Indian country within the meaning of section 2145, Revised Statutes, because of the fact that allotments have been made in severalty to the members of the tribe of Osage Indians pursuant to the provisions of the Osage allotment act. (34 Stat. L. 539.)

4. That the incompetent Osage Indians in Osage County in
27 the State of Oklahoma are wards of the United States, and the allotment of their tribal lands in severalty pursuant to the provisions of the Osage allotment act (34 Stat. L. 539) does not deprive them of the protection of the United States, nor affect the jurisdiction conferred by section 2145 Revised Statutes.

The plaintiff in error designates the entire transcript of the record on file to be printed.

WILLIAM D. MITCHELL,
Solicitor General.

Service of a copy of the foregoing statement of points on which the plaintiff in error will rely and of portions of the record to be printed is hereby acknowledged this — day of March, 1926.

_____ _____,
_____ _____,
_____ _____,
Counsel for Defendants in Error.

[Indorsement on cover:]

File No. 31,784. W. OKLAHOMA, D. C. U. S. Term No. 1061. The United States of America, plaintiff in error, vs. John Ramsey and William K. Hale. Filed March 22nd, 1926. File No. 31,784.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1061

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JOHN RAMSEY AND WILLIAM K. HALE

IN ERROR OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinions delivered in the District Court are not officially reported. They are found at R. 6 and 7.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered March 1, 1926. (R. 5.) The lower court sustained demurrers to the indictment. The indictment charged the defendants with the crime of murder of an Indian in the Indian country. (R. 2.) It was based on Section 2145 of the Revised Statutes, providing that the laws of the United States as

to punishment of crimes " shall extend to the Indian country." The District Court held that because the land in the Osage Indian reservation, on which the crime was committed, was a restricted allotment, instead of a trust allotment, it was not Indian country, within the meaning of Section 2145 of the Revised Statutes. (R. 6.) The case is properly here on writ of error, sued out by the United States under the Criminal Appeals Act, Chap. 2564, 34 Stat. 1246, because the decision below involved the construction of a statute on which the indictment was founded. *United States* v. *Sutton,* 215 U. S. 291; *United States* v. *Pelican,* 232 U. S. 442.

THE QUESTION PRESENTED

The question presented is whether that part of the Osage Indian reservation on which the crime was committed ceased to be Indian country, within the meaning of Section 2145 of the Revised Statutes, extending the criminal laws of the United States to the Indian country, because held as a restricted allotment instead of as a trust allotment.

STATEMENT

The defendants in error, white men, were indicted in the United States District Court for the Western District of Oklahoma. They were charged, one with murdering, and the other with aiding and abetting the murder of, Henry Roan, a full-blood Osage Indian and a legal member of the Osage tribe. (R. 2.) The indictment stated that

the crime was committed "in Osage County, in said district, in the Indian country and in and upon the reservation theretofore and then established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land therein which was then and there under the executive [exclusive] jurisdiction of the United States and comprised a restricted surplus allotment, theretofore made under and according to the act of Congress approved June 28, 1906, * * * the title to which said allotment * * * was held in trust by the United States and was inalienable," by Rose Little Star, the allottee, who had never received a certificate of competency authorizing her to sell it. (R. 2.)

The defendants in error filed demurrers (R. 4, 5) to the indictments on the ground that the place where the crime was committed was not in the Indian country within the meaning of Section 2145, Revised Statutes, extending the application of the criminal laws of the United States to the Indian country, and that the indictment therefore stated no offense against the laws of the United States. The demurrers to the indictments were sustained on this ground. (R. 5.)

THE STATUTES INVOLVED

Section 2145 of the Revised Statutes of the United States provides as follows:

> Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to

the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 273 of the Criminal Code is as follows:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Section 272 of the Criminal Code provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof * * *.

The Osage Allotment Act of June 28, 1906, Chap. 3572, 34 Stat. 539, is in the Appendix to this brief.

HISTORY OF THE OSAGE INDIAN RESERVATION

The title to what afterwards became the Osage Indian reservation was originally held by the Cherokee Nation of Indians by virtue of letters patent signed by President Van Buren on December 31, 1858, pursuant to the provisions of a treaty with the Cherokees concluded December 29, 1835, and proclaimed May 23, 1836 (7 Stat. 478). Pursuant to Article 16 of its treaty with the United States concluded July 19, 1866, and proclaimed August 11, 1866 (14 Stat. 799, 804), the Act of Congress approved June 5, 1872 (Chap. 310, 17 Stat. 228), and the Act of Congress approved March 3, 1873 (Chap. 228, 17 Stat. 530, 538), the Cherokee Nation on June 14, 1883, executed a deed to this land to the United States "in trust for the use and benefit of the Osage and Kansas Indians." The lands thus conveyed were specifically set apart and confirmed as a reservation for the Osage Tribe of Indians by the Act of June 5, 1872, and from that time until the Osage Allotment Act of June 28, 1906, this reservation was occupied in common by the members of the Osage tribe. The Osage Allotment Act of 1906 provided for the division of the lands and funds of the Osage Indians, for establishing a tribal roll, and the creation of an allotting commission, and each member of the tribe was permitted to make three selections of tracts of 160 acres each, one to be known as a homestead and the others as surplus allotments. The oil, gas, coal, and other minerals in the allotted lands were reserved to the

tribe for a period of 25 years. The homestead allotments were made inalienable until otherwise provided by Congress, and the surplus allotments were made inalienable for a period of 25 years, unless a certificate of competency should be sooner issued to the allottee. The tribal organization was continued by the Act.

Subdivision Fourth of Section 2 of the Act referred to "certificate of allotment" as well as deed. Section 5 provided (34 Stat. 544):

> That at the expiration of the period of twenty-five years * * * the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, * * * and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, * * * and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

Although the Act seems to have contemplated that after the selections were made certificates of allotment should issue and that the legal title should remain in the United States in trust until the restrictions against alienation were removed by expiration of time or earlier issuance of certificate of competency, and that the deeds should be issued when the restrictions were thus removed, the Interior Department seems to have construed the statute to provide for the immediate issuance of deeds

to the allottees subject to the restrictions against alienation, and this construction was followed and deeds to the allotments were issued to the respective allottees, and the lands have been held as restricted allotments.

The continued control which the United States has since exercised over the Osage Indians and the allotted lands so conveyed to them is disclosed by the following statutes.

By the Act of March 3, 1909, Chap. 256, 35 Stat. 778, it was provided:

> That the Secretary of the Interior be, and he hereby is, authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and Osage tribes of Indians in Oklahoma: *Provided,* That the sales of the Osage lands shall be subject to the reserved rights of the tribe in oil, gas, and other minerals.

By the Act of March 3, 1921, Chap. 120, 41 Stat. 1249, the reservation to the Osage tribe of the oils and minerals in the allotted lands which by the Act of 1906 was to be effective until 1931, was extended to April 7, 1946. By Section 3 of that Act the members of the Osage tribe of Indians were declared to be citizens of the United States, but there was no provision in the Act subjecting them to the laws of the State. There were other provisions

in the Act relating to the disposition of the income of the members of the tribe.

By the Act of February 27, 1925, Chap. 359, 43 Stat. 1008, Congress dealt further with its wards of the Osage tribe and with their income and property. It provided, in Section 3, that lands devised to members of the tribe who did not have certificates of competency should be inalienable without the consent of the Secretary of the Interior. It provided that the property of Osage Indians not having certificates of competency should not be subject to the lien of any debt, claim, or judgment, except taxes, without the approval of the Secretary of the Interior. By Section 4 it was provided that certificates of competency theretofore issued might be revoked, without prejudice to the legality of any transactions theretofore made by reason of the issuance of the certificate. Section 7 provided that none but heirs of Indian blood should inherit from members of the Osage tribe of one-half or more Indian blood, any right, title or interest in and to the restricted lands.

By reason of the issuance of certificates of competency and resulting conveyances by competent allottees, the title to some portions of the reservation has passed to whites and others not members of the tribe. The greater portion of the reservation is still held in the form of restricted allotments by members of the tribe.

The Osage Indians still retain their tribal organization. They are in the course of being con-

ducted from a state of dependent wardship to one of full emancipation, and are in a "period of transition." They are still wards of the United States, and the United States has retained guardianship over their persons as well as over their property, and has assumed to exercise the same control over the restricted allotments as if in the form of trust allotments.

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in holding that the restricted allotment described in the indictment and on which the crime was committed is not Indian country within the meaning of that term as used in Section 2145 of the Revised Statutes.

2. The District Court erred in holding that land in the Osage Indian reservation, allotted to and conveyed to a member of the tribe as a restricted allotment, ceased to be Indian country because a "restricted" allotment rather than a "trust" allotment, and because the title had been conveyed to the Indian by deed and was not held by the United States in trust.

3. It erred in sustaining the demurrers to the indictment.

SUMMARY OF ARGUMENT

I. The power of Congress to punish crimes committed upon the person of a tribal Indian is not founded on exclusive sovereignty over the place where the crime is committed. It rests upon the

power of the United States over the subject matter and exists because tribal Indians are wards of the United States whom it has power to protect.

The power of the United States is therefore not dependent upon the fact that the crime is committed in or out of Indian country, and is not affected by the state of the title of the land on which the offense is committed.

While the power is not limited territorially, Congress has seen fit to exercise it only to the extent of punishing offenses against Indians when committed in what it has described as Indian country, and the question is, what Congress has intended by that term.

II. The term "Indian country," as used in Section 2145 of the Revised Statutes, originally described lands occupied by Indian tribes and outside of the States and organized Territories. It was later understood to include Indian reservations, within the boundaries of States, set apart for Indian tribes. The land in Indian reservations has been held not to have lost its character as Indian country by its allotment in severalty, where the United States holds the title in trust for the allottee, and there is no reason why any different rule should apply to restricted allotments under a system where title has been conveyed to the allottee, subject to restrictions as to alienation and other control by the United States. To be Indian country, it is sufficient if the lands

still belong to the Indians, provided its alienation is restricted and the United States has reserved control over the Indian interest, and the Indian owners have not dissolved the tribal relation and are still wards of the United States.

The Osage Indians are in a period of transition, and are being conducted from a state of dependent wardship to one of full emancipation, but they are still wards of the United States whom it has a duty and a power to protect; and the murder of a member of the Osage Indian tribe is an offense which the United States has power to punish, and it has intended to exercise that power where the offense is committed within Indian country.

The narrow question in this case is whether there is any such essential difference between land held under a "trust allotment" and which has been held to be Indian country, and land held under a "restricted allotment," as to justify the conclusion that the latter has lost its character as Indian country.

There is no substantial difference in the nature of the Indian interest. The alienation in either case is effectually restricted, and as to one class of allotments as much as the other the United States possesses a supervisory control over the land. In either case, by force of circumstances, the Indian is tied to the land on which the United States has placed him, and for that reason the duty and therefore the intention to protect him exists.

ARGUMENT

I

THE POWER OF THE UNITED STATES TO PUNISH OFFENSES COMMITTED UPON THE PERSONS OF TRIBAL INDIANS IS NOT BASED ON EXCLUSIVE TERRITORIAL SOVEREIGNTY AND IS NOT LIMITED BY THE STATE OF THE TITLE OF THE LAND ON WHICH THE OFFENSE IS COMMITTED

The decision of the District Court seems to have been influenced by the idea that the power of the United States to punish offenses against tribal Indians is in some way dependent upon the title to the land on which the offenses are committed.

The question here presented is not one of power, but one of intention. The power of the United States to define and punish crimes committed upon the persons or property of tribal Indians exists without regard to the place where the crime is committed. The power is one over the subject matter and not based on exclusive territorial sovereignty. It exists because the Indians are wards of the United States with respect to which there has arisen "the duty of protection, and with it the power." *United States* v. *Kagama*, 118 U. S. 375, 384; *United States* v. *Thomas*, 151 U. S. 577.

The United States has the power, if Congress sees fit to exercise it, to protect tribal Indians, who are its wards, by punishing offenses committed upon their persons or property, whether in or off an Indian reservation or in or out of Indian country.

Section 2145 of the Revised Statutes, originally enacted in 1834, provides that the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States shall extend to the Indian country. As applied to what was then defined as Indian country, all of which was outside the boundaries of the States, the United States had exclusive territorial sovereignty, and the effect of the statute was to make the laws of the United States punishing crimes operative on every person in that territory, whether white, black, or Indian.

This was so with respect to the land afterwards forming the Osage Indian reservation. Upon the admission of the State of Oklahoma to the Union, the United States lost its exclusive territorial sovereignty over the land within the Osage Indian reservation. By virtue of the rule of equality between the States admitted to the Union, no reservation of exclusive territorial sovereignty over land within the limits of the State was or could have been made as a condition to the admission of the State. *Coyle* v. *Oklahoma,* 221 U. S. 559; *Pickett* v. *United States,* 216 U. S. 456. The effect of the admission of the State was therefore to limit the application of the criminal laws of the United States, which had been extended by Section 2145 to all persons in the Indian country, to those cases where Congress has the constitutional power to

punish offenses committed in places over which the State and the Federal Government exercise concurrent jurisdiction within their respective spheres. No longer was an offense committed by a white man upon a white man in the Osage Indian reservation punishable under the laws of the United States. *Draper* v. *United States*, 164 U. S. 240; *United States* v. *McBratney*, 104 U. S. 621.

Section 1 of the Enabling Act under which Oklahoma was admitted to the Union provided (Act of June 16, 1906, Chap. 3335, 34 Stat. 267):

> That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

This provision probably added nothing to the powers of the United States.

That the United States retained the power to punish offenses committed by or against Indians within the State of Oklahoma is settled, but that power has its sanction in the duty and power of the United States to protect members of the Indian tribes under its guardianship. *Donnelly* v. *United*

States, 228 U. S. 243; *United States* v. *Pelican*, 232 U. S. 442.

Members of the Osage tribe are still under guardianship of the United States. Their tribal relations have not been dissolved and the wardship is not ended. The Osage Allotment Act of 1906 discloses that although the lands were to be allotted in severalty, the tribal relation, though ultimately to be dissolved, was not broken up by the making or taking of allotments, and the emancipation was only partial and not complete, and the wardship still continues. *United States* v. *Nice*, 241 U. S. 591.

To use an expression of this Court in *Smith* v. *McCullough* (decided March 22, 1926), the Osages are Indians who are "being conducted from a state of dependent wardship to one of full emancipation and needed to be safeguarded against their own improvidence during the period of transition."

When the members of the Indian tribes shall be completely emancipated and released from the guardianship, and consequently taken out from under the protection of the United States, is a matter for Congress to decide. *United States* v. *Celestine*, 215 U. S. 278. Congress has not made that decision with respect to the Osage Indians and in the Osage Allotment Act did not, as in Section 6 of the General Allotment Act of February 8, 1887, Chap. 119, 24 Stat. 388, 390, provide that upon the patenting of the lands to the Indians they "shall have the

benefit of and be subject to the laws, both civil and criminal, of the State" in which they reside, and legislation subsequent to the Osage Allotment Act of 1906 with respect to members of the Osage Indian tribe and their property, set forth in the statement of facts, discloses that the guardianship over their persons and property has been actively continued. *United States* v. *Osage County,* 251 U. S. 128.

The indictment, in charging the murder of a full-blood Osage Indian, who was a member of the Osage Indian tribe, therefore charges the murder of an Indian under the guardianship of the United States with respect to whom the United States had the duty and the power of protection.

The only question in the case is whether Congress has seen fit to exercise the power, and that depends on the construction of the term "Indian country" in Section 2145 of the Revised Statutes.

II

A RESTRICTED ALLOTMENT HELD BY A FULL-BLOOD OSAGE INDIAN IS INDIAN COUNTRY.

The question in this case is a very narrow one. In *United States* v. *Pelican,* 232 U. S. 442, it was held that land in an Indian reservation did not lose its character as Indian country where allotted in severalty, the title to be held in trust by the United States for 25 years for the sole benefit of the allottees, during which period the title was to be inalienable, and at the expiration of which the

title of the Indians was to become absolute and evidenced by conveyances to them. The situation in the case at bar differs from the *Pelican case* only in the fact that when the surplus allotments were made to the Osage Indians, deeds to the allotted tracts were made to them with the provision that the title should be inalienable by the Indian for 25 years, unless a certificate of competency were earlier issued.

The statute now found as Section 2145 of the Revised Statutes, extending the general laws as to punishment of crimes to the Indian country, was part of the Indian Intercourse Act, being the Act of June 30, 1834, Chap. 161, 4 Stat. 729. That statute defined the term "Indian country" as follows:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

That definition was not reenacted in the Revised Statutes, and Congress has not since undertaken to define the term.

In *Bates* v. *Clark,* 95 U. S. 204, 206–207, it is said:

> Though many statutes concerning intercourse with the Indians and prescribing offences within the Indian country were

passed, no other attempt to define what was Indian country was made by Congress until the act of 1834, the first section of which we have given *verbatim*. In the meantime, we had purchased the country west of the Mississippi, and had organized two States and a Territory there, and most of the Indians with whom we had to deal lived there. The country east of the Mississippi, and not within any State, was the region north of Illinois and Indiana, and north-west of Ohio, now constituting the States of Michigan and Wisconsin, and then under the government of the Michigan Territory.

Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fine, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offences were not committed in the Indian country as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian coun-

try, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then.

The Court further said (page 207):

> If the section which we have given *verbatim* be read with a comma or semicolon inserted after the word "State," or if, without the insertion of any point there, we read it so as to apply the words, "to which the Indian title has not been extinguished," to all the region mentioned in the section, we have a criterion which will always distinguish what is Indian country from what is not, *so long as the existing system governing our relations with Indians is continued.* (Italics ours.)

And again the Court said (page 208):

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

The question whether the Indian title has been extinguished was not the only test mentioned by the Court. That criterion was said to be applicable

> restored to the public domain. The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control.

The only question remaining in this case, therefore, is whether the fact that the Osage allotments were evidenced by deeds to allottees with restrictions against alienation deprived the lands of the character as Indian country which they would have had if a certificate of allotment had been made and the legal title held in trust by the United States until the time fixed for termination of the restrictions.

Every reason advanced in *United States* v. *Pelican, supra,* in support of the view that trust allotments are Indian country applies with equal force to restricted allotments.

In *United States* v. *Bowling,* 256 U. S. 484, at page 486–487, the Court said:

> Before coming to the acts under which the Secretary of the Interior proceeded, it will be helpful to refer to the modes, long in use, by which Indians are prevented from improvidently disposing of allotted lands. One is to issue to the allottee a written instrument or certificate, called a trust patent, declaring

> that the United States will hold the land for a designated period, usually twenty-five years, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period will convey the same to him, or his heirs, in fee, discharged of the trust and free of all charge or incumbrance. The other is to issue at once to the allottee a patent conveying to him the land in fee and imposing a restriction upon its alienation for twenty-five years or some other stated period. While alienation is effectually restricted by either mode, allotments under the first are commonly spoken of as trust allotments and those under the second as restricted allotments. As respects both classes of allotments—one as much as the other—the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.

The Osage Allotment Act of 1906 is so phrased as to justify the conclusion that Congress intended that certificates of allotment should be issued to the allottees and that the title to the land should be held in trust by the United States, deeds to the allottees to be issued only when the restrictions against alienation were removed by lapse of time or certificate of competency. If that be the proper con-

struction of the Act, the making of deeds, prior to the removal of restrictions on alienation, was unauthorized, and the case could be treated as if the title to allotted lands of incompetents was still held in trust by the United States. The Act was given a different interpretation and the deeds were issued. (See *McCurdy* v. *United States,* 264 U. S. 484.) However, this point is of no importance. We utterly fail to see how the difference between a trust allotment and a restricted allotment can make the difference between what is Indian country and what is not, within the meaning of the statute under consideration. The Indian title has not been extinguished by a restricted allotment any more than by a trust allotment. The interest of the Indian is equally subject to the control of the United States. In the present case, there was reserved to the tribe in common ownership the minerals and oils in all of the allotted lands for a period of 25 years. Congress has since enacted a statute extending the tribal reservation to oils and minerals for an additional 20 years, notwithstanding that the allotments were evidenced by deeds. It has enacted a statute changing the rule of descent with respect to the restricted allotments, and it has retained and exercised control over these restricted allotments as fully as it has over trust allotments.

Congress has recognized that restricted allotments are "Indian country" as well as trust allotments.

In the Act of January 30, 1897 (Chap. 109, 29 Stat. 506), is prohibited the introduction of

> intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, *or while the same shall remain inalienable by the allottee without the consent of the United States.* (Italics ours.)

Congress also declared lands held by the Pueblo Indians in communal ownership in fee simple under grants from the King of Spain to be Indian country within the meaning of a statute prohibiting introduction of liquor into the Indian country. *United States* v. *Sandoval,* 231 U. S. 28, 48.

In *United States* v. *Soldana,* 246 U. S. 530, it was held that the grant of an easement for railway purposes over Indian lands did not extinguish the Indian title to the land or destroy its character as Indian country. The Circuit Court of Appeals for the Eighth Circuit has held that the restricted Osage allotments are Indian country. *Townsend* v. *United States,* 265 Fed. 519.

The term "Indian title," the extinguishment of which was stated in *Bates* v. *Clark, supra,* to be the criterion for distinguishing what is Indian country from what is not, evidently was intended to describe the kind of title which an Indian holds when subject to control and guardianship of the United States, whether in severalty, or in common with other members of his tribe.

The reason for enacting laws protecting the Indian in Indian country is because Indian country is a place set apart by the United States for the occupancy of Indians, in which they have been placed by the United States, and from which by force of circumstances they are unable to remove, until fully emancipated, because they are not authorized to sell their lands. It is because they have been placed in certain localities, and in effect bound to the land without ability to move, that the United States has felt bound to protect them by adequate legislation while located where the United States has placed them. So long as the restrictions on the alienation of their property are not removed, and their tribal relation is not dissolved, the reasons continue for protecting them against crimes upon their persons and property, and those reasons exist whether their lands are held as " trust allotments " or " restricted allotments."

The trial court evidently supposed that the power to punish crimes against Indians depended upon the title of the United States to the land on which the offense was committed, and therefore assumed that because the United States had conveyed the legal title it had not retained jurisdiction over the soil. This, as has been shown, is based on the erroneous conception that the power of the United States to protect tribal Indians is founded on exclusive territorial sovereignty or jurisdiction.

The only other way to account for the decision of the trial court is to conclude that it construed the case of *United States* v. *Pelican* as holding that land in Indian reservations ceases to be Indian country where allotted in severalty, unless in the form of trust allotments with reservation of legal title in the United States. The *Pelican case* held that the land continued to be Indian country, notwithstanding the trust allotment method was used, but it did not lay down any rule to the effect that allotments in severalty by deed, with restrictions on alienation and reservations of control by the United States would deprive the land of its character as Indian country.

CONCLUSION

Henry Roan, described in the indictment as a full-blood Indian and a legal member of the Osage tribe, was a ward of the United States, the murder of whom the United States had power to punish. The offense was punishable under the laws of the United States if committed in Indian country, and the land on which the offense was committed and which was included in the restricted allotment of Rose Little Star, a member of the Osage tribe, to whom a certificate of competency had not been issued, and whose allotment was inalienable and remained undisposed of by her, was Indian country within the meaing of Section 2145 of the Revised Statutes, and the difference between a restricted

allotment and a trust allotment presents no reason or basis for the view that one constitutes Indian country and the other does not. The demurrers to the indictment should have been overruled.

Respectfully submitted.

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APRIL, 1926.

APPENDIX

Osage Allotment Act

Act of June 28, 1906. (34 Stat. 539.)

An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided,* That the principal chief of the Osages shall, within three months from and after the approval of this act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll

prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same

relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; and the adult members shall select their first selections and file notice of the same with the United States Indian agent for the Osages within three months after the approval of this act: *Provided,* That all selections of lands heretofore made by any member of said tribe, against which no contest is pending, be, and the same are hereby, ratified and confirmed as one of the selections of such member. And if any adult member fails, refuses, or is unable to make such selection within said time, then it shall be the duty of the United States Indian agent for the Osages to make such selection for such member or members, subject to the approval of the Secretary of the Interior. That all said first selections for minors shall be made by the United States Indian agent for the Osages, subject to the approval of the Secretary of the Interior: *Provided,* That said first selections for minors having parents may be made by said parents, and the word " minor " or " minors " used in this act shall be held to mean those who are under twenty-

one years of age: *And provided further,* That all children born to members of said tribe between January first, nineteen hundred and six, and the first day of January, nineteen hundred and seven, shall have their selections made for them within six months after approval of this act, or within six months after their respective births. That all children born to members of said tribe on and after the first day of January, nineteen hundred and seven, and before the first day of July, nineteen hundred and seven, shall have their selections made for them on or before the last day of July, nineteen hundred and seven, the proof of birth of such children to be made to the United States Indian agent for the Osages.

Second. That in making his or her first selection of land, as herein provided for, a member shall not be permitted to select land already selected by, or in possession of, another member of said tribe as a first selection, unless such other member is in possession of more land than he and his family are entitled to for first selections under this act; and in such cases the members in possession and having houses, orchards, barns, or plowed land thereon shall have the prior right to make the first selection: *Provided,* That where members of the tribe are in possession of more land than they are entitled to for first selections herein, said members shall have sixty days after the approval of this Act to dispose of the improvements on said lands to other members of the tribe.

Third. After each member has selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hun-

dred and sixty acres of land in the manner herein provided for the first selection.

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections: *Provided,* That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot." Each member of said tribe shall be permitted to designate which of his three selections shall be homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land and shall be inalienable for twenty-five years, except as hereinafter provided.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

Sixth. The selection and division of lands herein provided for shall be made under the supervision of, or by, a commission consisting of one member

of the Osage tribe, to be selected by the Osage council, and two persons to be selected by the Commissioner of Indian Affairs subject to the approval of the Secretary of the Interior; and said commission shall settle all controversies between members of the tribe relative to said selections of land; and the schedule of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior. The surveys, salaries of said commission, and all other proper expenses necessary in making the selections and division of land as herein provided shall be paid by the Secretary of the Interior, out of any Osage funds derived from the sale of town lots, royalties from oil, gas, or other minerals, or rents from grazing land.

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided,* That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of

his or her lands the same as any citizen of the United States: *Provided,* That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: *And provided further,* That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: *And provided further,* That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

Eighth. There shall be reserved from selection and division, as herein provided, one hundred and sixty acres on which the Saint Louis School, near Pawhuska, is located, and the one hundred and sixty acres on which the Saint John's School, on Hominy Creek, Osage Indian Reservation, is located, said tracts to conform to the public surveys; and said tracts of land are hereby set aside and donated to the order of the Sisters of Saint Francis; and said tracts shall be conveyed to said order, the Sisters of Saint Francis, as early as practicable, by deed. There shall also be reserved from selection and division forty acres of land near Gray Horse, to be designated by the Secretary of the Interior, on which are located the dwelling houses of John N. Florer, Walter O. Florer, and John L. Bird, and said John N. Florer shall be allowed to purchase said forty acres at the appraised value placed

thereon by the Osage Allotting Commission, the proceeds of the sale to be placed to the credit of the Indians and to be distributed like other funds herein provided for.

Ninth. There shall be reserved from selection and division, as herein provided, the northeast quarter of section three, township twenty-five, range nine east, of the Indian meridian, and one hundred and sixty acres to conform to the public survey at the town of Gray Horse, including the Government doctor's building, other valuable buildings, and the cemetery, and the one hundred and sixty acres to conform to the public survey adjoining or near the town site of Hominy; said lands or tracts are hereby set aside for the use and benefit of the Osage Indians, exclusively, for dwelling purposes, for a period of twenty-five years from and after the first day of January, nineteen hundred and seven: *Provided,* That said land may, in the discretion of the Osage tribe, be sold under such rules and regulations as the Secretary of the Interior may prescribe; and the proceeds of the same under such sale shall be apportioned and placed to the credit of the individual members of the tribe according to the roll herein provided for.

Tenth. The Osage Boarding School reserve of eighty-seven and five-tenths acres and the reservoir reserve of seventeen and three-tenths acres and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska, as shown by the official plat of the same, are hereby reserved from selection and division as herein provided; and the same may be sold in the discretion of the Osage tribe, under such

rules and regulations as the Secretary of the Interior may provide; and the proceeds of such sale shall be apportioned and placed to the credit of the individual members of said tribe according to the roll herein provided for.

Eleventh. That the United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees in the town of Pawhuska, together with the lots on which the said buildings are situated, shall be sold to the highest bidder as early as practicable, under such rules and regulations as the Secretary of the Interior may prescribe; and with the proceeds he shall erect other suitable buildings for the uses mentioned, on such sites as he may select, the remaining proceeds, if any, to be placed to the credit of the individual members of the Osage tribe of Indians: *Provided,* That the house known as the chief's house, together with the lot or lots on which said house is located, and the house known as the United States interpreter's house, in Pawhuska, Oklahoma Territory, together with the lot or lots on which said houses are located, shall be reserved from sale to the highest bidder and shall be sold to the principal chief of the Osages and the United States interpreter for the Osages, respectively, at the appraised value of the same, said appraisement to be made by the Osage town-site commission, subject to the approval of the Secretary of the Interior.

Twelfth. That the cemetery reserve of twenty acres in the town site of Pawhuska, as shown by the official plat thereof, is hereby set aside and donated to the town of Pawhuska for the purposes of

sepulture, on condition that if said cemetery reserve of twenty acres, or any part thereof, is used for purposes other than that of sepulture, the whole of said cemetery reserve of twenty acres shall revert to the use and benefit of the individual members of the Osage tribe, according to the roll herein provided, or to their heirs; and said tract shall be conveyed to the said town of Pawhuska by deed, and said deed shall recite and set out in full the conditions under which the above donation and conveyance are made.

That the provisions of an act entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," approved March third, nineteen hundred and five, relating to the Osage Reservation, pages one thousand and sixty-one and one thousand and sixty-two, volume thirty-three, United States Statutes at Large, be, and the same are hereby, continued in full force and effect.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals covered by selections and divisions of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations

as he may prescribe: *Provided,* That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further,* That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however,* That nothing herein contained shall be construed as affecting any valid existing lease or contract.

SEC. 4. That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided.

First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or

to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further,* That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

Second. That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases, and moneys received from the sale of town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and an emergency fund for the Osage tribe, which shall be paid out from time to time upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

SEC. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased mem-

ber of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further,* That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

SEC. 8. That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior.

SEC. 9. That there shall be a biennial election of officers for the Osage tribe as follows: A princi-

pal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined.

SEC. 10. That public highways or roads, two rods in width, being one rod on each side of all section lines, in the Osage Indian Reservation, may be established without any compensation therefor.

SEC. 11. That all lands taken or condemned by any railroad company in the Osage Reservation, in pursuance of any act of Congress or regulations of the Department of the Interior, for rights of way, station grounds, sidetracks, stock pens and cattle yards, water stations, terminal facilities, and any other railroad purpose, shall be, and are hereby, reserved from selection and allotment and confirmed in such railroad companies for their use and benefit

in the construction, operation, and maintenance of their railroads: *Provided*, That such railroad companies shall not take or acquire hereby any right or title to any oil, gas, or other mineral in any of said lands.

SEC. 12. That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

Approved, June 28, 1906.

○

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1061.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JOHN RAMSEY AND WILLIAM K. HALE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE DEFENDANTS IN ERROR.

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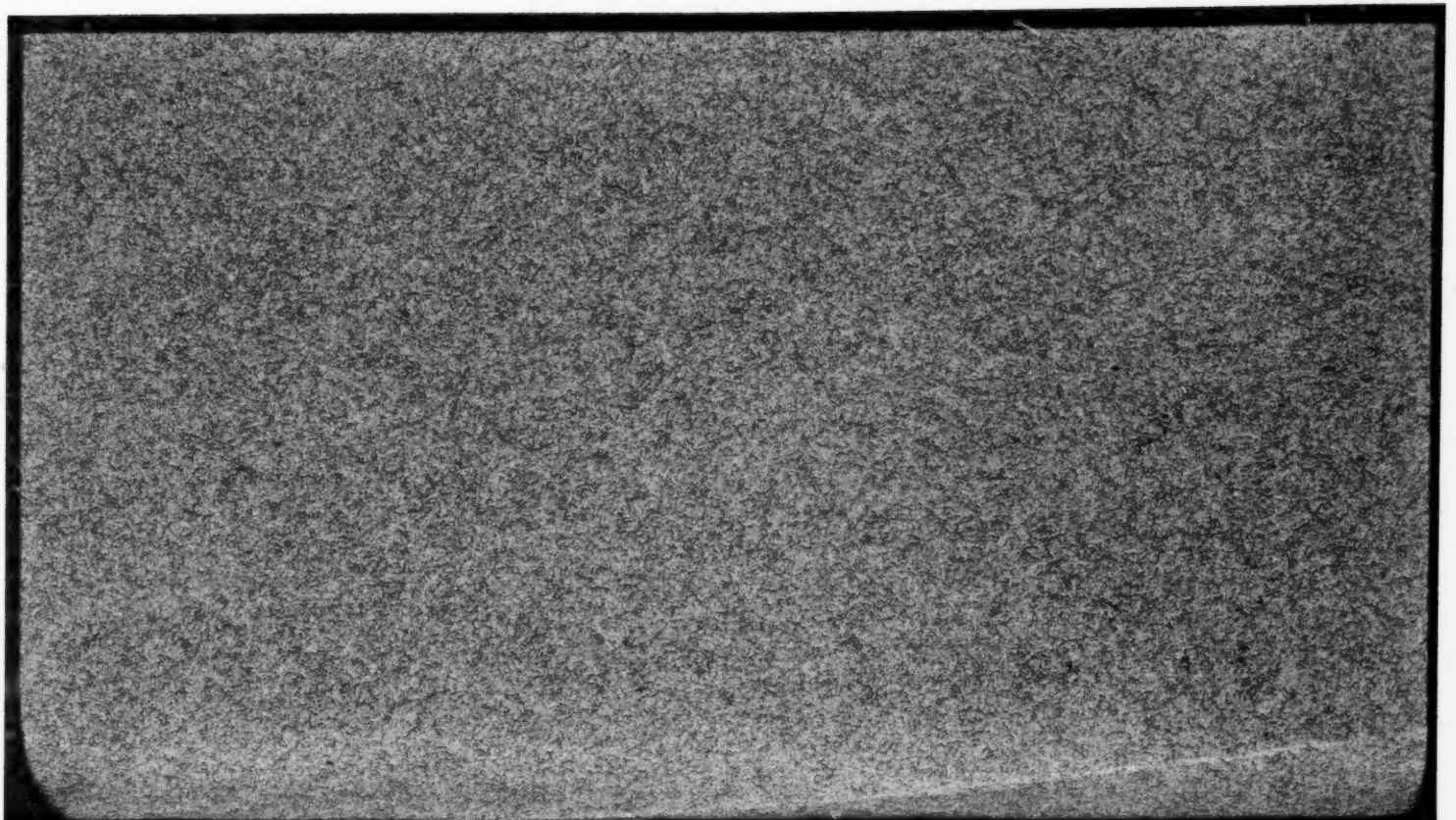

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1061.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JOHN RAMSEY AND WILLIAM K. HALE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE DEFENDANTS IN ERROR.

Statement.

The statement of the case contained in the brief of the Government is correct in so far as statutes and other enactments therein quoted are concerned, but as we do not quite agree with some of the deductions contained in the statement, it is considered advisable to

briefly state the case and a history thereof on behalf of the defendants in error.

As nearly as practicable we shall follow the order of the Government, and first call the attention of the Court to the history of the Osage Tribe of Indians and the lands allotted to its members.

The Osage Indians were residents of a reservation in the State of Kansas. Pursuant to a treaty made with the United States Government by the Osages, and pursuant to the provisions of a treaty made with the Cherokees, dated August 11, 1866 (14 Stat. at L., 799), and pursuant to an Act of Congress approved June 9, 1872 (17 Stat. at L., 228), and an Act of Congress approved March 3, 1873 (17 Stat. at L., 530), they were removed to that territory which now comprises Osage County, Oklahoma. This land was held in trust by the United States for the purpose of deeding it in fee simple to the individual members of the Osage Tribe, pursuant to section 16 of the treaty between the United States and the Cherokee Nation, entered into on August 11, 1866 (14 Stat. at L., 799). By the terms of the Osage Allotment Act of June 28, 1906 (34 Stat. at L., 539), a tribal roll was prepared, an Allotment Commission was created, and each member of the tribe selected his individual land, each member making a first, second and third selection, the remaining land to be divided among the members equally, thus giving to each member four selections of land, one of which was to be designated a homestead, which was to be inalienable and non-taxable until Congress so provided; the other three selections were designated as surplus land, and

was inalienable for twenty-five years except when certificates of competency were issued, but the surplus land became taxable after the expiration of three years from the date of the Allotment Act. In the event of the death of the allottee, or in the event of the issuing of a certificate of competency to the allottee, the surplus land immediately became alienable.

The act further provided, in section 7 thereof, that the individual members should have full control of their land. The act further provided that deeds to said land should be executed by the Principal Chief of the Osages, and approved by the Secretary of the Interior. Under the deeds executed, fee simple title to the land was conveyed to the individual members of the Tribe.

By the Act of March 3, 1909 (35 Stat. at L., 778), the Secretary of the Interior was authorized and empowered to conduct a sale of the surplus land of any of the members of the Osage Tribe upon *application therefor by the member.*

On February 9, 1910, the Secretary of the Interior promulgated the rules by which the lands which had been deeded to the members of the Tribe could be sold under the Act of March 3, 1909. By the rules thus promulgated, and under the interpretation of the act as placed thereon by the Secretary of the Interior, the deed for conveying said land was executed by the allottee as the owner of the land, and any mortgage taken for part payment thereof was executed to the allottee as mortgagee.

Under the Act of April 18, 1912 (37 Stat. at L., 86), "the property of deceased and of orphan minor, insane and other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of such Tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma."

This act further provides that the Superintendent of the Osage Agency or the Secretary of the Interior may investigate the conduct of executors, administrators and guardians or other persons having charge of the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and when the Superintendent or Secretary deemed it to the best interest of the allottee he might appear in the county court and report any delinquency to the court, and take steps to have such case investigated, and to prosecute any remedy, either civil or criminal, the expense thereof to be a charge either upon the administrator, guardian, or person in charge, on the one hand, or on the estate of the allottee on the other hand, as the county courts of Oklahoma should determine was proper.

It is further provided in this same act that the land of deceased Osage allottees should be subject to partition in any court of competent jurisdiction, in accordance with the laws of the State of Oklahoma.

In 1918, due to the fact that various towns were springing up in Osage County, Oklahoma, and that in many instances the most suitable and appropriate

place for the location of the town was a homestead allotment, Congress passed another act by the terms of which it was provided that the allottees of the Osage Nation might change the present designation of homestead to an equal area of their unincumbered surplus land, under such rules and regulations as the Secretary of the Interior might prescribe. After the change and designation, each tract should take the status of the other as it existed prior to the change and designation, as to alienability, taxation or otherwise. This act further provided that on proper application of an Osage allottee, he might be permitted to sell any of his land, whether surplus or homestead (34 Stat. at L., 541).

By the Act of March 3, 1921, the Osage Mineral Reservation was extended from April 7, 1931, to April 7, 1946. This act further provided a more definite scheme for the payment of taxes of certain Osage minor allottees and others, and in section 5 thereof, authorized the State of Oklahoma to levy and collect a gross production tax upon all oil and gas produced in Osage County. Section 3 of the Act of 1921 declared all the members of the Tribe to be citizens of the United States.

By Act of February 27, 1925, provision was made for making land or town property purchased with funds of non-competent members of the Tribe, inalienable without the consent of the Secretary of the Interior. This Act further provided, by section 4 thereof, for the revoking of certificates of competency of certain classes of members of the Osage Tribe.

The treaties, statutes and enactments above described embody all the legislative history necessary for the Court to consider in this case.

The defendants, John Ramsey and Wm. K. Hale, were charged in the indictment with having committed on February 26, 1923, the murder of Henry Roan, a full blood Osage Indian; it was alleged that the crime was committed in Osage County, Oklahoma, on the surplus allotment of Rose Littlestar, or Tom-pah-pe, a restricted Osage allottee whose land was held in trust by the United States and was under the exclusive jurisdiction of the United States.

The deceased, Henry Roan, was a member of the Osage tribe of Indians, to whom the Secretary of the Interior has issued a certificate of competency.

We call attention here to section 2145 of the Revised Statutes 1878, and section 272 and section 273 of the Penal Code, as follows:

Section 2145 of the Revised Statutes of the United States provides as follows:

> "Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Section 272 of the Criminal Code provides:

> "The crimes and offenses defined in this chapter shall be punished as herein prescribed
> * * *

> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof. * * *"

Section 273 of the Criminal Code provides:

> "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of or attempt to perpetrate any arson, rape, burglary, or robbery; or perpetrated, from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed is murder in the first degree. Any other murder is murder in the second degree."

When the indictment was returned the defendants filed demurrers to the indictment, which will be found on pages 4 and 5 of the record, and which demurrers were sustained by the court for the reason stated in its order, beginning on page 5 of the record. It will be observed that the Court sustained the demurrers for the reason that the allotments to the Osages * * * were not trusts, but restricted allotments; that the title had passed out of the United States; that the allotment of Rose Littlestar was not held in trust by the United States, and for this reason, although inalienable, was not Indian country at the date of the alleged offense. (Rec., 7.)

While the contention may be stated in various ways, the only real question before the Court is whether or

not the lower court erred in sustaining the demurrers of the defendants to the indictment returned against them, for the reason stated.

We trust the Court will not consider as bad taste the excerpts from opinions contained herein. We have embodied them that the Court may have them in convenient form if needed.

ARGUMENT.

THE POWER OF THE COURTS OF THE UNITED STATES TO PUNISH A PERSON FOR AN ACT UPON A TRIBAL INDIAN OR OTHER PERSON IS LIMITED TO THE ACTS WHICH CONGRESS HAS DECLARED TO BE AN OFFENSE AGAINST SOME LAW OF THE UNITED STATES AND PROVIDED A PUNISHMENT THEREFOR.

Under this proposition we will discuss the first proposition of the Government in its brief, which is as follows:

> "The power of the United States to punish offenses committed upon the person of Tribal Indians is not based on exclusive territorial sovereignty, and is not limited by the state of the title of the land on which the offense is committed."

Congress is the only branch of the Government which has the power to define an act as an offense against the laws of the United States. Until Congress has so enacted, no offense has been committed against the laws of the United States, for there are no common

law crimes against the United States, and statutes creating and defining crimes are not to be extended by intendment because the court thinks that the Legislature should have made them more comprehensive.

United States *v.* Wetzel, 246 U. S., 533; 62 L. Ed., 872.

Kriechman *v.* U. S., 256 U. S., 363; 65 L. Ed., 992.

United States *v.* Hudson, 7 Cranch, 32; 3 L. Ed., 259.

United States *v.* Britton, 108 U. S., 193; 27 L. Ed. 701.

The courts of the United States will not extend the question of their jurisdiction to punish crimes unless that jurisdiction can be found in some express provision of the law applicable thereto. If there is a doubt as to the jurisdiction, it will be resolved in favor of the defendants. The offense must be found in an appropriate Act of Congress, and before a defendant can be punished, his case must be plainly and unmistakably within the statute.

United States *v.* Brewer, 139 U. S., 278; 35 L. Ed., 190.

United States *v.* Dietrich, 126 Fed., 676.

United States *v.* Martin, 176 Fed., 110.

The Constitution of the United States is a grant of power to the Congress of the United States to enact laws within its limits, and under the provisions of Article 10 of the Amendments to the Constitution, un-

less the power is expressly granted to Congress, the right to enact laws to punish murder is necessarily reserved to the states.

Wilkerson *v.* Rahrer, 140 U. S., 545.
Civil Rights Cases, 109 U. S., 3.

In the argument under the Government's Proposition 1, it is said:

> "The question here presented is not one of power but one of intention. The power of the United States to define and punish crimes committed upon the person or property of a Tribal Indian exists without regard to the place where the crime is committed."

The statement is further made that this power exists because the Indians are wards of the United States. The Government's attorneys cite the cases of United States *v.* Kagama, 118 U. S., 375; 30 L. Ed., 228, and United States *v.* Thomas, 151 U. S., 577; 38 L. Ed., 276.

In the Kagama case, the court was called upon to construe the provisions of section 9 of the Act of March 3, 1885 (23 Stat. at L., 385), wherein it was made a crime for one Indian to commit murder upon another Indian, upon an Indian reservation situated wholly within the limits of a State, and making such Indian so committing such crime subject to the same laws and subject to be tried in the same courts and in the same manner, and subject to the same penalties as all other persons committing the crime of murder on territory within the exclusive jurisdiction of the United States. In this case the court rehearsed the

history of the Indian reservation upon which the alleged crime was committed, and pointed out that it was land bought by the United States from Mexico by the Treaty of Guadalupe Hidalgo, and that the whole of California, with the allegiance of its inhabitants, many of whom are Indians, was transferred by that Treaty to the United States. The court pointed out that by this enactment a new departure was intended by Congress, and to go further than any law had theretofore gone, by including such crimes on an Indian reservation, and making them punishable by the United States. It was contended that this was a limitation upon the powers of the States, and in answer to this, the court said:

> "The statute itself contains no express limitation upon the power of a State or the jurisdiction of its courts. If there be any limitation in either of these it grows out of the implication arising from the fact that Congress has defined a crime committed within the State and made it punishable in the courts of the United States, but Congress *has* done this, and *can* do it with regard to all offenses relating to matters to which the Federal authority extends. Does that authority extend to this case?
>
> "It will be seen at once that the nature of the offense (murder) is one in which most all cases of its commission is punishable by the laws of the State and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residents of a tribe of Indians by the United States, and the fair

> inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State law upon white people found there. Its effect is confined to the acts of the Indians of some tribe, of a criminal character committed within the limits of the reservation."

The Court, in the language of Mr. Justice Miller, forcibly pointed out that these people were communities dependent upon the United States for their food and their political rights. It was said that they owe no allegiance to the States and receive from the States no protection, and in such a situation, in the language of the Court, "there arises the duty of protection, and with it, the power."

These Indians lived upon a reservation set apart for them. They had no rights under the laws of the State, and were wholly dependent upon the United States, and the United States owed a duty to them, and the power went with the duty. Congress in that case had passed a law which specifically applied to the offense of one Indian against another, committed within the limits of the reservation on which they alone lived and over which the State of California had no jurisdiction or control, and exercised no political rights.

In the case of United States *v.* Thomas, supra, one Indian was under prosecution charged with having killed another Indian within the La Court Oreilles Reservation in the State of Wisconsin, which was set apart for the exclusive use of the Chippewa Tribe of

Indians. Michael Thomas, the defendant, was prosecuted under section 9 of the Act of March 3, 1885 (23 Stat. at L., 385). In passing upon the question this Court, speaking through Mr. Justice Field, said:

> "The Indians of the country are considered as wards of the Nation, and whenever the United States set apart any lands of their own as an Indian reservation, whether within a State or Territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations."

It will thus be noted that this Court said in both of these cases that Congress had authority to pass the law under which the defendant in each case was being prosecuted, but this Court gave no suggestion that the trial court would have had any jurisdiction to try the defendant if there had not been a specific act of Congress applicable to the offense.

The Thomas case, also quoted from the Kagama case to the effect that the Indians under consideration were "communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the states, and receive from them no protection." In other words, the status of the Indian tribes in the Kagama case and in the Thomas case was one wholly dependent upon the Government, owing no allegiance to the State within which the reservation was situated, and receiving no

reciprocal protection therefrom. Such is not the status in the case at bar . The Osages are citizens of the State of Oklahoma. The land upon which the crime is alleged to have been committed is subject to the jurisdiction of the courts of the State of Oklahoma in probate matters and in civil and criminal matters. It is subject to taxation by the authorities of the State of Oklahoma. Henry Roan, for whose alleged murder the defendants are being prosecuted, was a citizen of the State of Oklahoma. He was subject to pay taxes upon his real estate within the State, upon his personal property; to pay road and other head tax, and every other form of taxation that any other citizen of the State of Oklahoma pays. He was qualified to institute any suit within the courts of the State of Oklahoma, or to be sued therein with reference to his property rights or his social or domestic relations. He was subject to jury service. He was a qualified voter under the laws of the State of Oklahoma. He was protected by the police power of the State of Oklahoma. He was subject to all of the criminal laws of the State of Oklahoma. In other words, he had exactly the same civil, social and political status that every other citizen of the State of Oklahoma had. No act of Congress exempted him from any of the duties of citizenship of the State of Oklahoma, or denied him any of its privileges, or its protection.

Act of June 28, 1906 (34 St. at L., 539).
Act of April 18, 1912 (37 St. at L., 86).
Act of March 3, 1921 (41 St. at L., 1249).
Act of June 16, 1906 (34 St. at L., 267).
Act of May 8, 1906 (34 St. at L., 182).
14th Amendment, Constitution of U. S.

The Government on page 13 of its brief says:

> "The decision of the District Court seems to have been influenced by the idea that the power of the United States to punish offenses against tribal Indians is in some way dependent upon the title to the land on which the offenses are committed.
>
> "The question here presented is not one of power, but one of intention. The power of the United States to define and punish crimes committed upon the persons or property of tribal Indians exists without regard to the place where the crime is committed."

These statements find no support in the enactments of Congress, nor in the decisions of this Court. On the contrary, this contention of the Government was overruled by this Court in the case of Louie *v.* United States, 254 U. S., 548; 65 L. Ed., 399. In that case Louie, an Indian, was indicted under section 273 of the Penal Code in the United States District Court for Idaho, for the murder of another Indian within the limits of the Cœur D'Alene Reservation. He was convicted and, by a motion in arrest of judgment, he objected to the jurisdiction of the court over his person and over the crime charged, on the ground that before the time of the alleged offense he had been declared competent, and that the land on which the crime was alleged to have been committed had been allotted and deeded to him in fee simple. The motion was overruled, and on appeal to the Circuit Court of Appeals of the Ninth Circuit, it held that the appeal could only

be to the Supreme Court, and dismissed the writ of error. The Supreme Court granted a writ of certiorari, and in disposing of the case, said:

> "We have no occasion to consider the question on which the Circuit Court of Appeals was divided. The motions made by the defendant in the District Court raised a question not of the jurisdiction of that court, but of the jurisdiction of the United States. The contention was, in essence, that, by reason of the facts set forth in the motions the defendant was, in respect to the acts complained of, subject to the laws of the State of Idaho, and not to the laws of the United States. In other words, that he did not violate the laws of the United States. The defendant, in effect, denied that the killing was, in the statutory sense, within the Reservation. If this was true, an essential element of the crime against the United States was lacking; as much so as if it had been established in United States *v.* Sutton, 215 U. S. 291, 54 L. Ed. 200, or in United States *v.* Soldani, 246 U. S. 530, 62 L. Ed. 870, that the region into which liquor was introduced was not Indian country. The case was reversed and sent back to the Circuit Court of Appeals for a determination of the case on its merits."

The lower court thereupon decided the case on its merits, and sustained the contention of Louie, the defendant, reversed the District Court of Idaho, and directed that he be discharged. In the statement of the case as made by the Circuit Court of Appeals, 274 Fed., 47, it is pointed out that the person whom Louie

was charged with having murdered was a Cœuer D'Alene Indian, and a ward of the United States. It is further pointed out that Louie himself was a member of the same tribe of Indians, by reason of the fact that he then and there had in common with all other members of said tribe an interest in certain tribal funds thereafter to be disbursed to the members of said tribe including Louie. In the Louie case, this Court held that notwithstanding the fact that the victim of the alleged crime was a ward of the Government, the power of the United States District Court to punish the commission of the crime was dependent upon the fact of its having been committed on an Indian Reservation.

In the discussion of the Government's Proposition 1, it is said that "the Osage Allotment Act did not, as in Section 6 of the General Allotment Act of February 8, 1887, provide that upon the patenting of the lands to the Indians they 'shall have the benefit of and be subject to the laws, civil and criminal, of the State' in which they reside."

The Osages were not subject to the General Allotment Act, but by the terms of the Osage Allotment Act of 1906 (34 St. at L. 539), and by the terms of the Oklahoma Enabling Act (34 St. at L., 267), and by the terms of the amendment to the Osage Allotment Act of April 18, 1912 (37 St. at L., 86), and by the terms of the further amendment thereof of March 3, 1921 (41 St. at L., 1249), all of the rights, duties, privileges and obligations of citizenship were conferred upon and given to the members of the Osage Tribe of Indians,

and by specific terms, the jurisdiction of the courts of the State of Oklahoma were extended over them.

THE ALLOTMENT OF ROSE LITTLESTAR FOR WHICH SHE HAD RECEIVED A PATENT IN FEE WAS NOT INDIAN COUNTRY AT THE TIME OF THE COMMISSION OF THIS ALLEGED OFFENSE, WITHIN THE PURVIEW OF SECTION 2145, REVISED STATUTES, OR ANY OTHER SECTION OF CHAPTER 4 OF THE ACT OF JUNE 30, 1834 (STAT. AT L., 729) RELATING TO THE GOVERNMENT OF THE INDIAN COUNTRY.

We are trying to follow the course of the brief of the Government in this brief of the defendants.

The prosecution in this case is based upon section 2145, United States Revised Statutes 1878, which statute reads as follows:

> "Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States except the District of Columbia, shall extend to the Indian country."

This section is a part of the statute of June 30, 1834 (4 St. at L., 729), which was enacted by Congress as "An Act to Regulate Trade and Intercourse with the Indian Tribes, and to preserve peace on the Frontiers." Section 2145, Revised Statutes, was section 25 of the act as originally passed, with the additional provision therein as follows: "Provided the same shall not extend to crimes committed by one Indian against the

person or property of another Indian." Later the provision was repealed, and section 2146 was enacted.

Revised Statutes of the United States, of 1878, contains a subdivision under the subject of "Indians." Chapter 4 of that subdivision is entitled "Government of Indian Country." The words "Indian country" are used in that chapter in twenty-three different sections. The definition of the words "Indian country," which was contained in the original Act of 1834 is omitted therefrom for the evident reason that the reviser realized that that definition was no longer applicable and could not with any appropriate reason be included in the revision. It was evidently omitted for the further reason that the use of the term "Indian country" in the twenty-three different sections develops the meaning of the term. A definition under the well established rules of lexicographers, must be both inclusive and exclusive. The use of this term in twenty-two of the twenty-three sections, shows beyond question that the surplus allotment of Rose Littlestar is not, and cannot be "Indian country" as this expression is attempted to be used in this indictment.

Indian country as defined by chapter 4 of the Revised Statutes of the United States 1878, is territory:

(*a*) In which the agent for each Tribe of Indians is authorized to sell for the Indians any * * * live stock belonging to such Indian. (Sec. 2127.)

(*b*) In which no person is permitted to trade with any of the Indians without a license therefor. (Sec. 2129.)

(*c*) In which any superintendent may refuse applications for license to trade. (Sec. 2130.)

(*d*) In which the superintendent of a district shall have the power to revoke the license of a trader who has theretofore been licensed. (Sec. 2131.)

(*e*) In which a person not an Indian cannot reside as a trader without a license. (Sec. 2133.)

(*f*) Into which a foreigner cannot go without a passport from proper civil authorities or officers of the United States commanding the nearest military post on the frontier. (Sec. 2134.)

(*g*) In which any person other than an Indian cannot receive by purchase or pledge from any Indian a gun or other weapon used in hunting, or any instrument used for domestic purposes. (Sec. 2135.)

(*h*) In which any person other than an Indian cannot hunt or trap, etc. (Sec. 2137.)

(*i*) From which any person cannot drive or remove except by the authority of the Secretary of War any domestic animal. (Sec. 2138.)

(*j*) In which every white person assaulting an Indian or other person, or in which an Indian making an asault upon a white person with deadly weapons shall be subject to prosecution in Federal courts. (Sec. 2142.)

(*k*) In which any white person committing arson, or any Indian who commits arson, shall be subject to punishment in Federal courts. (Sec. 2143.)

(*l*) Into which the general laws of the United States concerning forgery and offenses against the United States mails shall extend and subject the offender to prosecution in the Federal courts. (Sec. 2144.)

(*m*) From which the Superintendent of Indian Affairs, or other Indian officers have authority to remove persons unlawfully found therein, and in which the President of the United States has authority to direct the military forces to remove such. (Sec. 2147.)

(*n*) In which the military forces of the United States may be employed as directed by the President of the United States to perform certain duties. (Sec. 2150.)

(*o*) In which the marshal may employ a posse comitatus to assist in executing process. (Sec. 2153.)

(*p*) In which, if a white person destroys the property of a friendly Indian, he is subject to pay double damages to such Indian to whom the property damaged belonged. (Sec. 2154.)

(*q*) If the offender himself is unable to pay a sum equal to at least the value, the amount of the deficit shall be paid out of the Treasury of the United States. (Sec. 2155.)

(*r*) In which, if any Indian friendly to the United States destroys any property of anyone lawfully within such territory, or goes from such territory into any State inhabited by United States citizens, and there commits a depredation against the property of such citizens, or commits larceny of the property of such citizens, the United States shall, under process, pay to

the persons whose property has been taken its value from the funds of the Indian tribe inhabiting that country. (Sec. 2156.)

The foregoing definitions are the definitions given to the term "Indian country" in United States Revised Statutes in the above designated sections, which it will be noted are the sections immediately preceding and subsequent to Section 2145, under which the Government now attempts to say that it has jurisdiction to try the defendants, Ramsey and Hale for murder. These statutes and Section 2145 are all a part of one chapter on a general subject, and the same meaning is intended throughout when applied to the term "Indian country."

If the land described as the surplus allotment of Rose Littlestar and other full blood members of the Osage tribe is "Indian country," it is the duty of the United States to govern it as provided in all the sections of chapter 4, of the laws relating to government of Indian country. (Sec. 2127-2157, Rev. Stat. U. S. 1878.) It is common knowledge of which this Court will take judicial notice that the Government has made no effort to treat Osage County as Indian country since the admission of Oklahoma as a State of the Union.

The lands of the Osages was allotted in severalty, and deeds conveying a fee simple title were executed by the chief of the Osage tribe, and approved by the Secretary of the Interior, and delivered to the allottees, all on or before the 30th day of July, 1909. The specific land described in the indictment was so conveyed by deed executed by the principal chief of the Osage tribe

on the 20th day of May, 1909, and approved by the Secretary of the Interior on July 30, 1909. A certified copy of the deed to this land is attached to this brief as Appendix A.

The Act of June 30, 1834, was construed by this Court in Bates *v.* Clark, 95 U. S., 204, and referred to in the Government's brief on pages 17 and 19. The Court in that case, after considering various phases of the Act of 1834 as applied to the term "Indian country," said:

> "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indians' title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country without any further act of Congress unless by the treaty by which the Indians part with their title or by some act of Congress a different rule is made applicable to the case.
>
> "In the case of Fur Company *v.* United States, 2 Pet., 358, the goods of the company had been seized for violating the law by the introduction into the Indian country of the Act of 1802. This court held that if by treaties made with the Indians after the passage of that act, their title to the region where the offense was committed, had been extinguished, it had thereby ceased to be Indian country, and the statute did not apply to it."

The court further said:

> "So, in the case of United States *v.* 43 Gallons of Whiskey, 93 U. S., 188; 25 L. Ed., 846, where the Act of 1834 was fully considered;

> while the court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remained Indian country until they removed from it. The whole opinion goes upon the hypothesis that where the Indian title is extinguished, it ceases to be Indian country unless some such reservation takes it out of the rule. It follows from this that all the country described by the Act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by an Act of Congress."

In the case of United States *v.* Laribiere, 93 U. S., 188; 23 L. Ed., 846, this Court was called upon to define what constituted Indian country with reference to the introduction or possession of intoxicating liquors within the Indian country as defined and prohibited by the Act of June 30, 1834, and in passing, said:

> "Indian country as defined by the Act of 1834 was then so remote from settlements that there was no occasion to extend the prohibition to adjacent territory. This country (Indian country) has been so narrowed by excessive treaties that the white population is now all around it and regarding it with a wistful eye. It would be strange indeed, in view of this changed condition, if the commercial power lodged solely with Congress, and unrestricted as it is by State lines, did not extend to the enactment of a law to exclude spirituous liquors intended to corrupt the Indians, not only from existing Indian country, but from that which has ceased to be so by reason of its cession to the United States."

This reservation was in the State of Minnesota, and by a specific provision of the treaty between the United States and the Indians, it was provided that the United States should prohibit the introduction or sale of spirituous liquors into the Indian country, and the Court in further commenting upon the effect of this legislation, said:

> "Minnesota, instead of being injured, is benefited by this treaty. The immense tracts of valuable country formerly withdrawn from her civil jurisdiction is subject to it and her wealth and power greatly increased. Traversed by railroads built, in part at least, on lands which Congress was enabled to give by means of this treaty, the country is open to preemption and homestead settlements and sale, and will soon be occupied by a hardy and industrious people. All that the Government asks in return for this is that the ceded lands shall retain their original status so far as the introduction and sale of spirituous liquors to the Indians is concerned."

The distinction that the court makes in this case is that in defining Indian country as it relates to the prohibition against the introduction of intoxicating liquors it is not intended to extend the power or authority of the Government of the United States over the civil jurisdiction of the inhabitants of the country which is Indian country, only so far as the liquor laws are concerned, and no farther. For the same reason it cannot be contended that it is Indian country for the punishment of any crimes other than those arising out of the liquor traffic.

This Court had occasion to again define the term "Indian country" in the case of Dick *v.* United States, 208 U. S., 340, 52 L. Ed., 520, as relating to the introduction of intoxicating liquors into the Indian country. Dick was prosecuted for having introduced whiskey into the Indian country in and upon the Nez Perce Indian Reservation in Idaho. The whiskey was found in his possession, in the town of Culdesac, where the Indians' title had been entirely divested. The treaty in this case, as in the case last quoted from, also provided that the United States should protect the Indians from the introduction of intoxicating liquors into or upon their reservation, and Congress enacted appropriate statutes for that purpose. The court held the defendant was guilty, but in passing, said:

> "If this case depends entirely upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we shall feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant, for that statute when enacted, did not intend by the words 'Indian country' to embrace any part of territory in which at the time the Indians' title had been extinguished, and over which, and over the inhabitants of which, as was the case of Culdesac, the jurisdiction of the state for all purposes of government was full and complete."

The distinction is again made by this Court that land may be Indian country as regards the prohibition against the introduction of intoxicating liquors, and for no other purpose, and in this case it was Indian

country only for that purpose by reason of a treaty which made it so.

In the case of Evans *v.* Victor, 204 Fed., 361, the Circuit Court of Appeals of the Eighth Circuit, in which Oklahoma is situated, considered the question as to whether a certain drug store in the city of Muskogee, in what was originally a part of the Creek Indian Reservation, was Indian country, within the contemplation of the whiskey statute. The court, speaking through Judge Sanborn, said:

> "What, then, is Indian country? Congress, by the Act of 1834, chapter 161, 4 Stat. at Large, 729, declared that 'All that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River and not within any state, to which the Indian title shall not have been relinquished for the purposes of this Act, be taken and deemed to be Indian country.'"

And the court, continuing, said:

> "And it has been settled by repeated and uniform decisions of the Supreme Court, from Bates *v.* Clark, 95 U. S., 204, wherein the rule was first clearly announced in 1877, to Clairmont *v.* United States, 225 U. S., 551, wherein it was re-affirmed in 1912, and it is conceded by counsel for the defendants (who were officers of the United States seeking to enforce the liquor statute) that the criterion by which to determine whether a specific tract of land, or location, is in the Indian country is that all the

> country described by the Act of 1834 as Indian country remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by a treaty or an Act of Congress, ceases to be Indian country whenever that title is extinguished. Dick *v.* United States, 208 U. S., 340. Legislation and adjudications and their history from which this criterion has been deducted, are recited in the opinions in the cases which have just been cited, and it would be a futile task to repeat them here."

Further, the court said:

> "Counsel maintains that this land is Indian country because Congress has continued in force the tribal organization and government of the Creek Nation, and maintained an Indian agent for the conduct of the business of that Tribe, because many members of the Tribe remain under the general guardianship of the Government, and the latter holds three million dollars in trust for that Tribe, but it would be flying in the face of a long line of uniform decisions of the Supreme Court to make these facts the criterion of Indian country, and to hold this land to be Indian country, which, by the criterion established by the Supreme Court, the extinction of the original Indian title, is not Indian country, and this court declines so to do."

The same court, in the case of United States *v.* Myers, 206 Fed., 387, considered the question as to whether or not the land embraced in the Rainy Mountain Indian School, in the Kiowa Indian Reservation in Okla-

homa, was Indian country as defined by the Act of 1834. The Government alleged that the Rainy Mountain School was Indian country, and sought to recover a penalty against an Indian trader who had returned to the land embraced in this Indian school, after being ejected therefrom, upon the theory that section 2148 of the Revised Statutes, which was simply a modification of section 2 of the Act of August 18, 1856, which was passed as a supplement to the Act of 1834, and the court said that whatever was Indian country within the meaning of the Act of 1834, was Indian country within the meaning of section 2148 as originally enacted. The question, therefore, resolved itself as to what was Indian country within the meaning of the Act of 1834, and the court, in passing, said:

> "Indian country, therefore, is, as conclusively appears from all the cases, a country to which the Indians retain the right of use and occupancy, involving under certain restrictions, freedom of action and of enjoyment in their capacity as a distinct people, unless by virtue of some reservation expressed at the time of extinguishment of such title and clearly appearing. In the absence of such, the term does not apply to any tract owned and controlled by the Government and devoted by it, whereas a so-called reservation, or a mere foundation, to the benefit of the Indian exclusively or otherwise unattended by any semi-independent use and occupancy involving such title, ownership and control as has always inhered in the Indians as a distinct people, and not merely as individual wards. *In re* Lelah-Puc-Ka-Chee, 98 Fed., 429, Benson *v.* United States, 44 Fed., 178. Whether

a reservation for any purpose affecting Indians is of a character sufficient to stamp such land as Indian country within the meaning of the law, must depend upon the scope and purpose of the act creating it and the nature of the title, use and occupancy now held, exercised and enjoyed.

"In United States *v.* Celestine, 215 U. S., 278, the Supreme Court said: 'the word "reservation" has a different meaning, for while the body of land described in the section quoted as Indian country, was a reservation, yet a reservation is not necessarily Indian country. The word is used in the Land Law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation or an Indian reservation, or indeed, one for any purpose for which Congress has authority to provide.' It follows that this setting apart of a limited tract of the public domain for a school which the Government devotes mainly, or even entirely, to the training and education of Indian children attending in their individual capacity, could not operate to convert that tract into Indian country as defined in the statute invoked by plaintiff in error. Many cases may be found which recognize the right of the Government to preserve or extend the limits of Indian country and the forms of law applicable thereto, in the case of land to which the Indians' title has in other respects been extinguished.

United States *v.* 43 Gallons of Whiskey, 93 U. S., 188.

Dick *v.* United States, 208 U. S., 340.

Hallowell *v.* United States, 221 U. S., 317.

> Others declare the right to prohibit the sale of liquor to Indians who are wards of the Government and in charge of Indian Agents. Mosier *v.* United States, 198 Fed., 54; United States *v.* Holliday, 3 Wall., 407, and still others recognize the power of Congress under the Commerce clause, to prohibit shipments of liquor in what was formerly known as the Indian Territory. United States Express Company *v.* Friedman, 191 Fed., 673, *Ex Parte* Webb, 225 U. S., 663. Nothing herein is in conflict with the view expressed in these cases. They serve largely to emphasize and confirm the distinction we have drawn. None of them either involve or support the contention that tracts such as this are Indian country as defined in this statute."

In the case of Clairmont *v.* United States, 225 U. S., 551, 56 L. Ed., 1201, this Court reviewed the conviction of the plaintiff in error in the district court of Montana, on a charge of introducing intoxicating liquor into the Flathead Indian Reservation in that State. The defendant in the case had some whiskey in his possession while on a train of the Northern Pacific Railway Company running through the Reservation. It was conceded, and this Court held, that the railroad owned the title to its right of way in fee by grant from Congress. This Court, in reversing the case, said:

> "The question, then, is, whether a person having intoxicating liquor in his possession on a railway train running on this strip can be deemed to have introduced the liquor into the Indian country within the meaning of the Act

> of 1897. Was this Indian country so that the District Court of the United States can be said to have had jurisdiction of the alleged offense?"

The Court then quotes the definition of Indian country from the Act of June 30, 1834, 4 Stat. at Large, 729, and said:

> "This portion of the Act of 1834 was not reenacted in the Revised Statutes as other parts of the statute were, and hence was repealed by Section 6596 of the revision of the United States Compiled Statutes 1901, page 3750, but as has frequently been stated by this court, the definition may still be referred to in connection with the provisions of its original text which remains in force and may be considered in connection with the changes which have taken place, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. *Ex Parte* Crow Dog, 109 U. S. 556, United States *v.* Le Bris, 121 U. S. 278."

The Court then quotes with approval the criterion applied by Justice Miller, in Bates *v.* Clark, 95 U. S., 204, and continuing, said:

> "It must be assumed that in the Act of 1897, Congress used the words 'Indian country' in the accepted sense, and this is confirmed by the provision bearing witness to the policy which had been adopted, looking to the dissolution of tribal relations, and the dissolution of tribal property in separate allotments. Thus the Act provides that the term 'Indian country' shall include any allotment while the title to the same shall be

held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States. United States *v.* Sutton, 215 U. S., 291; Halloweil *v.* United States, 221 U. S., 317. That the effect of a cession by the Indians might be qualified by stipulation and treaty that the ceded territory although within the boundaries of a state, should retain its original status of Indian country so far as the introduction of intoxicating liquor into it was concerned, was decided in United States *v.* 43 Gallons of Whiskey, 93 U. S., 188, but as was pointed out in Bates *v.* Clark, that decision proceeded upon the hypothesis that when the Indians' title was relinquished it ceases to be Indian country unless some such reservation takes it out of the rule. The same principle of decision was recognized in Dick *v.* United States, 208 U. S., 340, already quoted from. In the present case there was no provision either in the treaty with the Indians or by Act of Congress which limited the effect of the surrender of the Indians' title. The Indians' title or right of occupation was extinguished without reservation, and the relinquished strip came under the jurisdiction of the then Territory, and later under that of the State of Montana. It was not unappropriated public lands or land owned or held by any Indian or Indian Tribe. Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indians' title, and that in accordance with the repeated ruling of this Court, it was not Indian country, and the district court therefore had no jurisdiction of the offense, and the judgment must be reversed."

All of the cases above cited which define Indian country, with the exception of the Myers case, 204 Fed., 364, were liquor cases, and construed either the provisions of the Act of 1834, or the express provision of the Act of January 30, 1897, and the cases construing the Act of January 30, 1897, do so by simply giving effect to the explicit definition of the term "Indian country" as enacted by Congress, to apply alone to violations of the law arising under the liquor statute.

The indictment in the case at bar is based upon and written from the case of the United States *v.* Pelican, 231 U. S., 442, 58 L. Ed., 676. In that case the defendant, Sam Pelican, was charged with having committed murder of one Louie, a full-blood Indian and a member of the Colville Tribe, on the allotment of one Agnes, an Indian, said land being then held in trust by the United States for the said Agnes for a period of twenty-five years from the date of the trust patent, December 6, 1909. It was charged that the offense was committed on August 30, 1913. It was stipulated by the parties on the hearing on the demurrer in the court below in that case, that the land described in the indictment had been alloted to the Indian allottee, Agnes, under an act approved February 8, 1887. Section 5 of that act reads as follows:

> "That upon the approval of the allotments provided for in this act, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottee, which patent shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for

> the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs."

Section 8 of that act, as far as applicable, reads:

> "That the provisions of this act shall not extend to the territory occupied by the Osages in the Indian Territory." (24 Stat. at Large, 388.)

The Act of February 8, 1887, *supra*, was amended by the Act of May 8, 1906, 34 Stat. at Large, 182. This amendment, among other things, reads as follows:

> "That until the issuance of fee simple patents, the allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States."

In the Pelican case reference is made to the Act of May 8, 1906, and the offense named in the indictment was charged to have been committed on the 30th day of August, 1913, on a tract of land held in trust by the United States, under an allotment made pursuant to the Act of February 8, 1887, as amended by the Act of May 8, 1906.

In this case there was no appearance in this Court for the defendant in error, Sam Pelican. It was not called to the attention of this Court that there was a distinction between land held in trust by the United States for an Indian as applied to the words "Indian country" and the expression used in the liquor statute of 1897. The decision was rendered therein because

the land was held in trust, and because, pursuant to the amendment of May 8, 1906, the allottees and their lands were expressly made subject to the exclusive jurisdiction of the United States. We have no fault to find with the decision in the Pelican case in so far as it was necessary to pass upon the question before the court. The land upon which the crime was alleged to have been committed was Indian country because the original Indian title had not been extinguished. The allottee, Louie, had been given a trust patent, which simply entitled him to the use of the land, but did not convey to him the original Indian title thereof. The original Indian title was held by the Government in trust, and the same measure of title was retained by the Government when it allotted this particular tract to Louie. It was also Indian country under the express provisions of the Act of May 8, 1906, *supra*, and remained Indian country until the issuance of a fee simple patent.

On page 22 of the Government's brief it is stated—"Every reason advanced in United States *v.* Pelican, *supra*, in support of the view that trust allotments are Indian country, applies with equal force to restricted allotments," but counsel for the Government do not support this statement with any authority and they further overlook the fact that Congress has never, by any enactment, provided that lands to which a fee simple title may be conveyed to the Indian but held under restriction, was Indian country, as it did in the Act of May 8, 1906, with reference to lands held in trust, which was also the evident intention of Congress in the General Allotment Act of February 8, 1887. If Con-

gress had thought that it could retain exclusive jurisdiction and control over allotted lands to which the title in fee simple had been conveyed to the allottee, it certainly would have said so, in definite terms, as it did with reference to the trust allotments. Or it would have so said as it did in the Act of January 30, 1897, relating to the introduction of intoxicating liquors into the Indian country.

In the Pelican case, which was not briefed by the defendant in error, there is certain language quoted from the liquor statute of January 30, 1897, which would seem to say that land allotted to an Indian remains Indian country until the expiration of the trust period, or as long as there are restrictions upon alienation. This language was not necessary or applicable in the case, for the reason that the allotment of Agnes, upon which the crime in that case was alleged to have been committed, was held in trust by the Government under the express provisions of the Act of February 8, 1887, as amended by the Act of May 8, 1906, and therefore, by the very terms of the act as amended, was under the exclusive jurisdiction of the United States, and for the further reason that the language with reference to allotments upon which the restrictions of alienation had not been removed, is taken from the statute which was passed expressly for the purpose of protecting the Indian against the use of intoxicating liquors, and was not passed as an amendment to or an extension of section 2145. And even if the court should consider that the reference by the court in the Pelican case, to the Act of January 30, 1897, was relevant, it

could have no bearing upon the determination of the question at bar, for the reason that Congress passed an Act on March 2, 1917, making Osage County, Oklahoma, Indian country, within the meaning of the Act of Congress, making it unlawful to introduce intoxicating liquors into the Indian country, and not for any other purpose, so that Osage County could not be considered Indian country for other purposes because it was not considered Indian country by Congressional interpretation under the Act of January 30, 1897; otherwise there was no occasion to enact the law of March 2, 1917.

Another case cited in the Government's brief, and upon which it seems to depend is the case of Donnelly *v.* United States, 228 U. S., 243, 57 L. Ed., 820. The locus of the crime in the Donnelly case was the Hoopa Valley Indian Reservation in the State of California, which had been validly set apart as an Indian Reservation under the Act of 1864. It had not been segregated into individual allotments by trust patents, certificates of allotment or otherwise; consequently, the original Indian title was undisturbed and unextinguished, and was, therefore, Indian country and under the exclusive jurisdiction of the United States.

Another case cited in the Government's brief is that of United States *v.* Celestine, 215 U. S., 278, 54 L. Ed., 195. In this case the defendant, Bob Celestine, an Indian, was prosecuted by indictment for having committed the crime of murder of Mary Chealco, an Indian woman, within the Tulalip Indian Reservation in the State of Washington. He was not prosecuted under

section 2145, but under section 9 of the Act of March 3, 1885 (23 Stat. at Large, 385), which statute gives to the United States exclusive jurisdiction over the prosecution of any Indian committing the crime of murder against the person of another Indian or other person within the limits of an Indian Reservation. The decision of that court did not, and necessarily could not, determine any question relating to what is or what is not Indian country within the meaning of Revised Statutes 2145. In the Tulalip Reservation the land was not conveyed to the members by restricted allotment in fee, but the members of the tribe were given trust allotments. It was contended that the special jurisdiction of the United States was taken away by the giving of the trust allotment. In passing upon this point, the court said:

> "The condition of the treaty with the Omahas made by reference a part of the treaty with the Tulalip Indians, providing for only a conditional alienation of the lands, makes it clear that the special jurisdiction of the United States has not been taken away."

The court further comments in the Celestine case, upon the fact that the allottees would not become subject to the State laws until the trust period had expired and they had been given a title in fee simple as provided in the Act of May 8, 1906.

The case of United States *v.* Thomas, 151 U. S., 577, is referred to in the Government's brief. We have heretofore analyzed that case, and think it unnecessary to make any further comment thereon, except to say

that the prosecution was based on the same statute and the allotments were made under the same law as in the Celestine case.

The cases of United States *v.* Sandoval, 231 U. S., 28; United States *v.* Soldani, 246 U. S., 530; Townsend *v.* United States, 265 Fed., 519, and Pronovost *v.* United States, 232 U. S., 48, are cited in the Government's brief and relied upon as authority for their contention in this case. An examination of these cases discloses that they are liquor introducing cases, and that they neither throw an informing light on the question before the court, nor do they assist the court in any way in determining what is Indian country within the meaning of section 2145, Revised Statues, and the related sections.

The Government, in its brief, on pages 13 and 14, say:

> "The effect of the admission of the State was, therefore, to limit the application of the criminal laws of the United States, which had been extended by section 2145, to all persons in the Indian country, to those cases where Congress has the constitutional power to punish offenses committed in places over which the State and Federal Government exercised concurrent jurisdiction within their respective spheres. No longer was an offense committed by a white man upon a white man in the Osage Reservation, punishable under the laws of the United States."

The Government cites in support of this statement, Draper *v.* United States, 164 U. S., 240, and United States *v.* McBratney, 104 U. S., 621. These cases do

not construe section 2145, Revised Statutes, but construe section 9 of the Act of Congress of March 3, 1885 (23 Stat. at Large, 385), and the decisions in these cases are based upon the reason that the statute does not cover offenses committed by white men against white men or against Indians.

Section 2145, by its terms, applies to all persons alike. It will be observed in this case that the defendants, Ramsey and Hale, are both white men, citizens of the State of Oklahoma, and amenable to all her laws.

It is said on page 18 of the Government's brief, that Congress has not thought it necessary to make any new definition of Indian country. Yet since 1834 a large body of laws has been in existence applicable to Indian country. And men have been punished by death, by fine and by imprisonment, of whom the court who so punished them, had no jurisdiction if the offenses were not committed in the Indian country.

We cannot agree with this. Every cited and reported case of conviction, develops that the offense was either on an Indian reservation, or under some treaty or valid law impressing the locus of the offense as Indian country, and following a valid law providing a punishment for the offense. But the court will find no case of a sustained conviction where the offense occurred on a parcel of ground which had once been a part of a reservation, and where the Indian title had been extinguished and supplanted by a restricted allotment of land in fee. And if custom throws a helpful light on the problem, then we point out that this is the first time since Oklahoma was admitted into the Union as a State,

that the Federal courts have asserted jurisdiction over offenses committed against competent Indians under such circumstances and on such land. It is idle to say there have not been such offenses. Outside of the land allotted to the Five Civilized Tribes, and other Indians throughout Oklahoma, and throughout the Nation, there are in Osage County alone, approximately six hundred thousand acres of restricted Indian property, which comprises nearly one-half of Osage County, the remainder of the county not being restricted, all intermingled. How many crimes, of larceny, bigamy, assault and murder have occurred thereon no one can say. That the State, since statehood, has asserted and maintained its jurisdiction over crimes against her laws in such territory cannot be denied in the face of her penitentiary records; that the Federal Government has asserted jurisdiction cannot be affirmed, in the silence of her records. And this for the good and sufficient reason that the Indian is a citizen. He pays taxes, gross production and *ad valorem*, by express permission of the Congress of the United States and the laws of Oklahoma. His failure to pay such taxes would result in the taking of the title to his property by the State of Oklahoma, and, in such a situation, the title to the land which is now contended to be Indian country would be vested in another under the processes of the laws of Oklahoma. Would it then be Indian country? We dare to say that an investigation would disclose the fact that this very allotment of Rose Littlestar, upon which this offense is alleged to have been committed, was sold for taxes under the laws of Oklahoma. As

he pays taxes for the support of the Government, he is entitled to and receives the support and protection of that Government. He is a voter, and votes at all elections in Oklahoma. (Sec. 1, Art. 3, of the Constitution.) He is liable for jury service. (Sec. 3523, Compiled Statutes of Oklahoma, 1921); he presides in the courts; he represents his county or district in the State Legislature, and his district and State in the Congress of the United States. If necessary, his land is partitioned in the local courts; for proper causes, and on proper grounds, he is granted a divorce by the laws of Oklahoma, and the deceased in this very case was a divorced husband under the laws of the State of which he was a full citizen. He has every burden any other citizen has, and every right and duty of the citizen are his. And this is never true when the land is held in trust by the United States, or where he resides on an Indian Reservation.

United States *v.* Rickert, 188 U. S., 432, 47 L. Ed., 532.

United States *v.* McCurdy, 264 U. S., 483, 68 L. Ed., 802.

Bluejacket *v.* Johnson County, 5 Wall., 737, 18 L. Ed., 667.

McCulloch *v.* Maryland, 4 Wheat., 316, 4 L. Ed., 579.

Choate *v.* Trapp, 224 U. S., 665.

Congressional Interpretation.

It is our contention that Congress itself has interpreted the meaning of the act in question, and has indirectly said that it has not the meaning now contended

r by the Government. The Act of Congress of June 30, 1834, used the expression "Indian country." This was a general expression. And by sections 20 and 21 thereof it was made an offense to sell or manufacture intoxicating liquors in such country. In 1887, and again in 1892, Congress amended these sections, and extended their application beyond the original limits of the Indian country, and made them apply to disposing or giving or selling any intoxicating liquor to any Indian under charge of an Indian Superintendent, or who attempted to or did introduce intoxicating liquors into the Indian country. By this amendment, Congress distinguished between an Indian under the supervision of an Indian agent on the one hand, and Indian country on the other hand. On January 30, 1897, Congress passed a specific liquor statute, and did not include within its terms any other offense, or make the expressions used therein cover geographically any other statute in existence. (29 St. at Large, 506.) In this special liquor statute, making it an offense to introduce intoxicating liquor into the Indian country, it was provided, as will be seen, that this term "shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottees without the consent of the United States." This was perfectly within the power of the United States to enact under the Commerce clause of the Constitution.

In the case of Morgan *v.* Ward, 224 Fed., 698, it was held that this was an amendment and did not create any new offense outside of the liquor statutes. And in

United States *v.* Wright, 229 U. S., 226, 57 L. Ed., 1160, in speaking of this act, Mr. Justice Pitney, speaking for the court, said:

> "The Act of January 30, 1897 (Chap. 109, 29 Stat. at Large, 506), while having an independent title, 'An Act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes,' was manifestly intended primarily as an amendment of the Act of 1892. This appears from a comparison of the clauses defining the acts prohibited, from the circumstances that the Act of 1897 contains no provisions of its own prescribing the venue for complaints, arrests and trials, and especially from the provision of its second section 'that so much of the Act of the 23rd day of July, 1892, as is inconsistent with the provisions of this act, is hereby repealed.' The prohibition is made to apply to the sales of intoxicants 'to any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by the Government or to any Indian a ward of the Government under charge of an Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government through its Department, exercises guardianship"

And the familiar prohibition of the introduction of intoxicants "into Indian country" is repeated, with the addition of the following new clause: "which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee

without the consent of the United States." The act then provides a punishment for the offense.

Congress also understood that Osage County, Oklahoma, was not under the general criminal law involving Indian country, and on March 2, 1917, with this knowledge and this interpretation, it passed a special act applying to Osage County, which reads as follows:

> "All of Osage County, Oklahoma, shall hereafter be deemed to be Indian country within the meaning of the acts of Congress making it unlawful to introduce intoxicating liquors into the Indian country." (39 Stat. at Large, 983.)

It will thus be seen that by the Act of March 2, 1917, Congress specifically limited the expression "Indian country" with reference to Osage County, so as to make it fall only within the meaning of the acts of Congress making it unlawful to introduce intoxicating liquors into the Indian country. This was part of the General Appropriation Act for the support of the Indian Department, and was enacted by Congress with full knowledge of the preceding legislation on the subject. Our contention is that in this act, Congress for the first time fixed the status of all of Osage County as Indian country, and this only to make it apply to offenses involving the introduction or disposition of intoxicating liquors to the Indians.

Reference has been made to the case of United States *v.* Nice, 241 U. S., 591. We, ourselves, request a consideration of this case. An investigation of the case shows that the Government asserted its right to prosecute the defendant, Nice, for selling whiskey to

an allotted Indian, a ward of the Government, in Tripp County, South Dakota. It based its contention on two grounds,—first, that Congress had the right, under the commerce clause, to regulate intercourse with the Indians; second, that it had the right, because of its guardianship of the Indians. Both of these contentions were sustained, and the Act of January 30, 1897, referring to intoxicating liquor, held to be a valid exercise of power simply and wholly because of these two reasons. The Government in its argument pointed out, and the court apparently sustained the law, not as an exercise of police power, but as above stated, a valid exercise of its power under the commerce clause.

Conclusion.

We cannot close this brief without calling to the attention of the Court the far-reaching result of its decision in this case. If the United States has jurisdiction over this offense, then the State has no jurisdiction of this or any other violation of any law which the United States has made criminal and attempted to extend over such property, regardless of the legislation of the State of Oklahoma over identical offenses. Will the thousands now confined in the jails and penitentiaries of Oklahoma, under processes of her courts, be awarded writs of *habeas corpus*, or taken to Federal courts for prosecution, or go free in all cases where the statute of limitation has run in their favor? Will the State of Oklahoma be forced to cease her enforcement of the laws over restricted Indian property,

which embraces such a large part of her territory, in approximately sixty of her seventy-seven counties? Will the State have jurisdiction over a parcel of land one day, and the Federal Government over the adjoining parcel of land the next day? Will the Federal Government have jurisdiction one day and lose it the next, because of some legal change in the character of the land, resulting from the State's sovereign power to tax? Or will the State have jurisdiction today, and the Government tomorrow, because it has purchased land for the Indian and caused it to be restricted against alienation?

Sunderland *v.* U. S., 69 L. Ed., 79.
U. S. *v.* Brown, 8 Fed. (2d), 564.

While these considerations do not determine the definition of Indian country, surely it will develop a situation never intended, and wholly inconsistent with the contentions made by the Government in this case.

We respectfully submit that the action of the district court, in sustaining the respective demurrers, should be sustained.

Respectfully submitted,

J. M. SPRINGER,
Attorney for John Ramsey.
WILLIAM S. HAMILTON,
EDW. C. GROSS,
S. P. FREELING,
J. I. HOWARD,
Attorneys for W. K. Hale.

APPENDIX A.

Endorsements:

STATE OF OKLAHOMA,
Osage County, ss:

The within instrument was filed for record on the 10th day of August, 1909, at 10:00 o'clock a. m., and recorded in Book 1, A. D., on page 214.

[SEAL.] T. L. BROADDUS,
Register of Deeds.

Allotment Deed, Osage Reservation, Oklahoma.

Allotment No. 188.

Osage Indian Lands from Peter C. Bigheart, Principal Chief,

to

Tom Pah pe.

To all to whom these presents shall come, Greeting:

Whereas, The Act of Congress approved June 28, 1906, entitled "An Act for the Division of the Land and Funds of the Osage Indians in Oklahoma Territory, and for Other Purposes" (34 Stat. L., 539), provides that all lands belonging to the Osage Tribe of Indians in Oklahoma, except as herein provided, shall be divided among the members of said Tribes; and,

Whereas, Said Act of Congress further provides that all lands selected by and allotted to each member (except his homestead) shall be designated as "surplus lands"; and,

Whereas, Tom pah pe, a duly enrolled and recognized member of the Osage Tribe, has selected a homestead in accordance with law; and,

Whereas, The Osage Allotting Commission, as provided in the sixth subdivision of section 2 of the Act of Congress, has certified that the lands hereinafter deescribed constitute the surplus lands of said Tom pah pe as contemplated by said Act of Congress; and,

Whereas, Section 8 of the act provides that the deeds to said Osage lands, or any part thereof, shall be executed by the Principal Chief of the Osages, but no such deed shall be valid until approved by the Secretary of the Interior;

Now, therefore, I, the undersigned Principal Chief of the Osage Tribe of Indians, by virtue of the power and authority vested in me by said Act of Congress have granted and conveyed, and by these presents do grant and convey unto the said Tom pah pe all right, title and interest of the United States and the Osage Tribe of Indians in and to the following described lands situated in the Osage Reservation in Oklahoma, to-wit:

The East Half (E. ½) of the Southeast Quarter (S. E. ¼) of Section Thirty-three (33); East Half (E. ½ of the Southwest Quarter (S. W. ¼) of Section Thirty-four (34), Township Twenty-five (25), Range Five (5); Southwest Quarter (S. W. ¼) of Section Fourteen (14), Township Twenty-five (25), Range Six (6); Southwest Quarter (S. W. ¼), South Half (S. ½) Northwest Quarter (N. W. ¼) of Northeast Quarter (N. E. ¼) of Southeast Quarter (S. E. ¼) and Southwest Quarter (S. W. ¼) of Northwest Quarter (N. W. ¼) of Southeast Quarter (S. E. ¼) of Section Five (5), Township Twenty-six (26), Range Eleven (11); all North and

East of the Indian Base and Meridian, containing four hundred ninety-five (495) acres, more or less, according to the United States survey thereof.

To have and to hold the same unto the said Tom pah pe, her heirs, executors, administrators, and assigns forever, subject, however, to all the conditions, limitations and provisions of said Act of Congress, one of which is that all oil, gas, coal, or other minerals, covered by the lands for the selection and division of which provision is herein made, are hereby reserved to the Osage Tribe for a period of twenty-five (25) years from and after the 8th day of April, Nineteen Hundred and Six.

In witness whereof, I, Principal Chief of the Osage Tribe of Indians, have hereunto set my hand and seal this 20th day of May, 1909.

All erasures and interlineations made before signing hereof.

[SEAL.] PETER C. BIGHEART,
Principal Chief of the Osages.

Witnesses:
E. W. JERMAK,
ROBERT C. BLACK.

DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS, *July* 26, 1909.

The foregoing is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

T. H. ABBOTT,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR, *July* 30, 1909.

The foregoing deed is hereby approved.

FRANK PIERCE,
Acting Secretary.

This is to certify that the above copy of allotment deed, Osage Reservation, Oklahoma, Allotment No. 188, Tom pah pe, is correct and agrees with the original deed on file in this agency.

F. E. BRANDON,
S. D. A. in charge Osage County.

Pawhuska, Okla., Jan. 18, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 1061.—October Term, 1925.

The United States of America, Plaintiff in Error, *vs.* John Ramsey and William K. Hale.	In Error to the District Court of the United States for the Western District of Oklahoma.

[June 1, 1926.]

Mr. Justice Sutherland delivered the opinion of the Court.

The defendants in error, two white men, were charged, by an indictment returned in the court below, with the murder of one Henry Roan, a full-blood Osage Indian and a legal member of the Osage Tribe, committed "in Osage County, in said district, in the Indian country and in and upon the reservation theretofore and then established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land therein which was then and there under the exclusive jurisdiction of the United States and comprised a restricted surplus allotment, theretofore made under and according to the act of Congress approved June 28, 1906, . . . the title to which said allotment . . . was held in trust by the United States and was inalienable" by the allottee, who had never had issued to her a certificate of competency authorizing her to sell the allotment. The indictment is drawn under § 2145 R. S., which extends the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, to the Indian country, with certain exceptions not material here. The court below sustained a demurrer to this indictment upon the ground that the allotment described in the indictment as the *locus* of the crime was not Indian country within the meaning of § 2145. Thereupon, the construction of the statute upon which the indictment is drawn being involved, the case was brought here

on writ of error under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The authority of the United States under § 2145 to punish crimes occurring within the State of Oklahoma, not committed by or against Indians, was ended by the grant of statehood. *United States* v. *McBratney*, 104 U. S. 621, 624; *Draper* v. *United States*, 164 U. S. 240. But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before, *Donnelly* v. *United States*, 228 U. S. 243, 271, in virtue of the long-settled rule that such Indians are wards of the nation in respect of whom there is devolved upon the Federal Government "the duty of protection, and with it the power." *United States* v. *Kagama*, 118 U. S. 375, 384. The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the nation, *United States* v. *Osage County*, 251 U. S. 128, 133; *United States* v. *Nice*, 241 U. S. 591, 598; and it rests with Congress alone to determine when that relationship shall cease. *Matter of Heff*, 197 U. S. 488, 499; *United States* v. *Celestine*, 215 U. S. 278, 290.

The sole question for our determination, therefore, is whether the place of the crime is Indian country within the meaning of § 2145. The place is a tract of land constituting an Indian allotment, carved out of the Osage Indian reservation and conveyed in fee to the allottee named in the indictment, subject to a restriction against alienation for a period of 25 years. That period has not elapsed, nor has the allottee ever received a certificate of competency authorizing her to sell. As pointed out in *United States* v. *Bowling*, 256 U. S. 484, 486, there are two modes by which Indians are prevented from improvidently disposing of their allotments. One is by means of a certificate, called a trust patent, by the terms of which the Government holds the land for a period of years in trust for the allottee with an agreement to convey at the end of the trust period. The other mode is to issue a patent conveying to the allottee the land in fee but prohibiting its alienation for a stated period. Both have the same effect so far as the power of alienation is concerned, but one is commonly called a trust allotment and the other a restricted allotment. The judgment of the court below turns upon this narrow difference.

In *United States* v. *Pelican*, 232 U. S. 442, a case involving the murder of an Indian upon a trust allotment, this court held (p. 449) that trust allotments retain "during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation", and that they are embraced within the term "Indian country" as used in § 2145. But the opinion makes it clear that the difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was not regarded as important. The court said:

"The explicit provision in the act of 1897, as to allotments,* we do not regard as pointing a distinction but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severalty where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the Government. . . . The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control."

The essential identity of the two kinds of allotments—so far as the question here under consideration may be affected—was recognized in the *Bowling* case, where it was said (p. 487) that in one class as much as the other "the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction." In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same.

Since Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States, the question presented is not one of power but wholly one of statutory construction. Viewed from that premise, it would be quite unreasonable to attribute to Congress

*This refers to c. 109, 29 Stat. 506, an act to prohibit the sale of intoxicating drinks to Indians. It provides that the term Indian country "shall include any Indian allotment, while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, . . ."

an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term Indian country to one and not to the other.

It follows that the judgment sustaining the demurrer to the indictment is erroneous and must be

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.